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## ABSTRACT

Walker, William Palmer (Major, USAF). Legal Issues in Intercollegiate Athletics: An Analysis of Gender Equity, Contract, and Tort Liability Litigation from 1990-1995. Published Doctor of Education dissertation, University of Northern Colorado, 422 pp., 1996.

The threat of litigation is a very real and ominous prospect facing collegiate athletic departments in the 1990s. Therefore, it is imperative that collegiate athletic directors employ preventive law practices to minimize their department's legal vulnerability. The purpose of this study was to identify, classify, analyze, evaluate, and synthesize litigation directed exclusively at intercollegiate athletic programs. This study was also designed to provide intercollegiate athletic directors with a comprehensive outline of litigation in the 1990s and recommendations to align their programs in accordance with current court rulings.

The primary method used to locate case law for this study was computer-assisted legal research (CALR). CALR provided the specificity and flexibility required to identify the most current litigation involving intercollegiate athletic departments. After identification of all relevant litigation was accomplished, a typology was developed to classify all identified litigation into major areas of law. Seventy-two percent of the cases fell into three major areas of law identified as: (a) gender equity, (b)

contract law, and (c) tort liability. These three areas were further divided into sub-areas into which individual cases were classified. All cases classified in the three major areas of law were thoroughly analyzed through the use of a litigation analysis worksheet. Evaluation and synthesis of the cases within each major area was provided with a corresponding discussion of emerging trends and conclusions. As a result of the synthesis, 52 recommendations to make intercollegiate athletic programs less vulnerable to litigation were forwarded.

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UNIVERSITY OF NORTHERN COLORADO

Greeley, Colorado

The Graduate School

LEGAL ISSUES IN INTERCOLLEGIATE ATHLETICS:  
AN ANALYSIS OF GENDER EQUITY, CONTRACT,  
AND TORT LIABILITY LITIGATION  
FROM 1990-1995

A Dissertation Submitted in Partial Fulfillment  
of the Requirements for the Degree of  
Doctor of Education

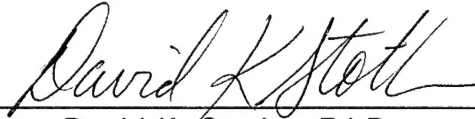
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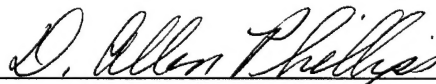


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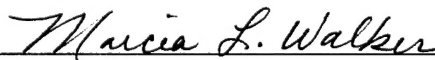
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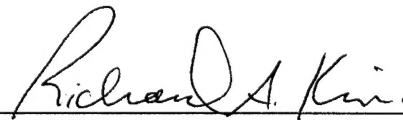
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## ABSTRACT

Walker, William Palmer. Legal Issues in Intercollegiate Athletics: An Analysis of Gender Equity, Contract, and Tort Liability Litigation from 1990-1995. Published Doctor of Education dissertation, University of Northern Colorado, 1996.

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tort liability. These three areas were further divided into sub-areas into which individual cases were classified. All cases classified in the three major areas of law were thoroughly analyzed through the use of a litigation analysis worksheet. Evaluation and synthesis of the cases within each major area was provided with a corresponding discussion of emerging trends and conclusions. As a result of the synthesis, 52 recommendations to make intercollegiate athletic programs less vulnerable to litigation were forwarded.

The analysis of relevant court holdings led to the identification of policies and practices that have led to legal conflict. The resulting synthesis was intended to facilitate revisions in current practices in order to make collegiate athletic programs legally sound. Although a number of defendants prevailed in litigation examined in this study, the final ruling is not necessarily the critical element to be taken from each case. By examining claims in which the defendants ultimately prevailed as well as those in which the plaintiffs prevailed, practices which led to legal conflict can be identified and corrected so as to make litigation less inviting.

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*"Laws and institutions must go hand in hand with the progress of the human mind"*

Thomas Jefferson, July 12, 1816

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## CHAPTER I

### INTRODUCTION

#### Background

"Litigation has become the nation's secular religion" (Lieberman, 1977, p. 58). This may have been a bold statement when written, but one not without merit today. Americans have turned to litigation as the preferred method of resolving disputes (Lieberman, 1981). This obsession with litigation is, however, not a new phenomenon. As far back as the ancient Roman Empire, civilizations have suffered from litigation's paralyzing effect (Lieberman, 1981).

Americans' penchant for using litigation to settle disputes has been reaching record proportions. Shapiro (1992) reported that 18 million lawsuits were filed yearly in the United States. This was up from 1980 estimates ranging from 5 million to 12 million (Lieberman, 1981). Federal suits have risen from 90,000 in 1960 to 250,000 in 1990 (Brewer, 1995). One government report estimates Americans spend "\$300 billion a year in needlessly higher prices for products and services as a result of excessive legal costs" (Gillespie & Schellhas, 1994, p. 143).

As far back as 1978, the expanding role of the courts was disturbing even to those within the system. One former United States Deputy Attorney General remarked, "the legal process, because of its unbridled growth, has become a cancer which threatens the vitality of our forms of capitalism and democracy" ("Those #\*x/!!! Lawyers," 1978, p. 56).

The curiosity with this wave of litigation has not been limited to attorneys and legal scholars. A recent Wall Street Journal/NBC News poll showed 58% of respondents felt it more important to reduce the number of lawsuits than to protect one's right to sue (Harwood, 1995).

The United States House of Representatives has also entered the debate. The tremendous number of litigants, together with the astronomical damages being awarded plaintiffs, has prompted some federal legislators to take action (Gillespie & Schellhas, 1994). Many Congressional candidates were elected to office in November of 1994 on the basis of the Republican "Contract with America" which contained litigation reform as a cornerstone (Gillespie & Schellhas, 1994). As a result, House Republicans introduced bills to reduce what they call "frivolous and fraudulent" lawsuits (Hess, 1995, p. 2A). The Attorney Accountability Act, Securities Litigation Reform Act, and Common Sense Legal Standards Reform Act (Castello, 1995) have all passed in the House of Representatives and had been sent to the Senate for debate at the time of this study (Espo, 1995).

While it may not be clear how these reforms will directly impact the world of sports, if made statutory, they will affect the public's ability to litigate, and litigation has clearly shaped the manner in which sports and athletics are managed.

It has long been argued that sport is a reflection of society and law is the codification of society's values (G. W. Schubert, Smith, & Trentadue, 1986). It is therefore logical to assume that individuals involved in sport would have been held to the same legal standards as the rest of the population. This, however, has not always been the case.

Courts and regulatory agencies have historically been reluctant to become involved in legal issues concerning sports (G. W. Schubert et al., 1986), preferring instead to allow sports entities to "iron out" their disputes within their own organizational structures. Furthermore, many sport administrators were once protected from legal action by governmental immunity or simple respect for authority (K. A. Davis, 1994). K. A. Davis has pointed out that those days are gone, and sport administrators no longer enjoy such privilege.

As our society has become increasingly litigious, administrators at all levels of sport have been besieged by an increasing number and variety of lawsuits (G. W. Schubert et al., 1986). Sport lawsuits have ranged from wrongful death claims on behalf of student-athletes to professional football

fans filing suit in federal court to overturn a completed pass for a touchdown (Footlick, 1977).

Clearly, higher education athletics has not escaped the impact of litigation. Preliminary research for this study has shown that during the time period between January 1, 1990 and April 1, 1995, there were 74.5% more suits against colleges and universities as a result of athletic or physical education department actions or personnel than there were in the same time period a decade earlier. From 1977 to 1987, the number of tort liability lawsuits alone involving college or university athletic, intramural, or physical education departments rose 250% from the number of similar lawsuits covering the previous 47 years (McFadden, 1989/1990).

The increase of sport-related litigation has sparked considerable debate. Opponents of spiraling litigation have pointed to the stifling effect litigation may have on participation, enthusiasm, and intensity. Horine (1985) argued that the increase in litigation has led some insurance carriers to deny liability coverage to coaches. Leo (1995) contended that manufacturer's liability insurance premiums account for one-half the cost of a \$200 football helmet. McClung (1981) stated that increased litigation has led to "confusion, frustration and even hostility towards the law" (p. 37) among educators. On the other hand, proponents of sport litigation have argued that the increased threat of legal action has, and will, make the athletic environment safer, healthier, and more civilized (Appenzeller & Appenzeller, 1980). H.



Appenzeller (1985b) has contended that "participants now enjoy the safest equipment, finest facilities, and best medical care and coaching ever--thanks to litigation" (p. 3). Lieberman has (1981) argued that litigation is indicative of a healthy society by stating, "the willingness to go to court is a sign that we are not going to the streets--the court of last resort" (p. 7).

Whatever one's opinion, there's no doubt this recent flurry of legal activity surrounding college athletics has thrown athletic directors into the eye of the storm. Potential legal attack from all directions has been an intimidating and, at times, overwhelming prospect for athletic directors. If athletic directors had known which areas of law had the greatest potential for litigation, that knowledge could have led to sound administrative practices by allowing them to focus attention on those areas which posed the greatest threat. Armed with this knowledge, athletic directors and other administrators may have averted many of the legal mistakes which have taken a tremendous toll in terms of money, time, and public relations.

A goal of this study was not only to educate intercollegiate athletic directors, but to address the concerns of both opponents and proponents of sport litigation. By describing recent litigation in a single-source document, the author hoped to inform collegiate athletic directors how to make their programs safer, healthier, and legally sound, thereby contributing to what proponents of litigation say is done by the courts. Meloy (1992/1993) described this "preventive law" process as enabling administrators to

"identify those policies and practices that could lead to legal conflict and thereby modify them in order to avoid unnecessary litigation" (p. 7).

If preventive law practices are indeed effective, as several authors have argued (Imber & Thompson, 1991; Kaiser, 1989; McClung, 1981; Meloy, 1992/1993), then, when applied to intercollegiate athletics, the benefits of litigation can be sowed without experiencing the associated hardships. The key element that has been missing is an accurate identification of policies and practices in athletics that have led to legal conflict.

Historically, most sport management texts have discussed the need for various types of legal training for sport administrators. Prior to this study, however, no definitive work has been done identifying current case law exclusively directed at intercollegiate athletic programs.

#### Purpose of the Study

The purpose of this study was to identify, classify, analyze, evaluate, and synthesize litigation against colleges or universities as a result of actions taken by their intercollegiate athletic departments or department personnel, from January 1, 1990 through December 31, 1995. This study was also designed to provide intercollegiate athletic directors and other sport administrators in higher education with a comprehensive outline of litigation in the 1990s and recommendations to align their programs in accordance with current court rulings.

### Need for the Study

There are three fundamental reasons this study was needed: (a) the need for legal research, education, and training regarding litigation involving intercollegiate athletics; (b) the lack of literature available to athletic directors and administrators specifically addressing litigation most commonly affecting collegiate athletic departments; and (c) the benefits to be gained through thorough case analysis of relevant litigation. Each of these reasons has been discussed below.

When discussing the need for legal research, Cohen and Olson (1992) argued, "Because the literature of the law is a central part of our societal history, legal research is also important to academic pursuits not only in law schools, but in universities generally" (p. 1).

It has become apparent that the need for legal research and education exists not only from a purely academic standpoint, but from a practical standpoint as well. H. Appenzeller (1985a) contended that courts have been adding greater responsibility and accountability to sport administrators' roles in managing their programs, and thus holding them to a higher legal standard of care.

Many have argued this expectancy of a higher standard of care should be accompanied by some additional training for athletic administrators and physical educators (McFadden, 1989/1990; Parker, 1986; Pittman, 1991/1992; Zwald, 1985/1986). Zwald listed legal rights and

responsibilities as one of 15 areas of coursework preferred for preparation of National Collegiate Athletic Association (NCAA) Division III athletic directors. Parker found an athletic director's requirement to interpret rules and regulations as indicative of the need for legal training for all potential athletic directors. McFadden (1989/1990) went so far as to suggest all physical education instructors enroll in sport law courses designed for sport professionals, and Pittman recommended that sport law be included in undergraduate physical education curricula.

The second element in the need for this study springs from the recommendations for education and training. There was clearly a need for a study to fill the conspicuous void in the body of knowledge available to collegiate athletic directors and administrators regarding areas of recent litigation. Intercollegiate athletic directors have had an abundance of legal resources available to them, but never a single-source document focused on the major areas of law with which they should be concerned. Through preliminary research of litigation involving intercollegiate athletic departments, it was discovered that 72% of the cases included in this study fell into three general areas of law identified as, (a) gender equity, (b) contract disputes, and (c) tort liability. It became imperative that cases in these three areas be researched thoroughly.

The third element in the need for this study was the importance of case analysis. Rombauer (1991) has stated many objectives in analyzing court

opinions, two of which are identifying unsettled areas of law, and gaining knowledge of existing law, to include "currently recognized rules and principles, the reasons underlying their development, and the types of factual situations in which they have been applied" (p. 16). Clearly, this type of knowledge would be beneficial to an athletic director or administrator as he or she navigates through uncharted legal waters. Meloy (1992/1993) argued "the practice of preventive law depends upon one's keeping abreast of new statutory and case law" (p. 35). Nolte (1979) contended that because the model for legal change in our system begins in the courts, "one must read the cases rather than the legislative code to understand at any one moment in time what your rights and liabilities may be" (p. 3).

The greatest benefit from case analysis, however, is its predictive quality. The "reason for analyzing opinions is to be able to predict, on the basis of what courts have done in past cases, what a court will do . . . in a future case should a problem reach a litigation stage" (Rombauer, 1991, p. 15). With the knowledge of how courts have ruled in recent cases, and reasonable assurance of how they will rule in the future, athletic directors and administrators can structure their programs and policies around sound legal practices.

### Delimitations of the Study

#### Scope

Only litigation naming one or more of the following parties as defendants was included in this study:

1. Intercollegiate athletic departments.
2. Members of intercollegiate athletic departments.
3. A college or university named as a result of the acts of commission or omission by members of the college or university athletic department.
4. A college or university, when named by a former member of their athletic department.

#### Dates

The following date criteria were used to determine the litigation included in this study:

1. Cases decided from January 1, 1990 through December 31, 1995.
2. Decision dates as reported on LEXIS.

#### Courts

Only cases heard in the following courts were included in this study:

1. All Federal entry-level courts and above.
2. State appellate-level courts and above.

### Definitions of Terms

Unlike many other disciplines, law has an unique vocabulary which may be unfamiliar to athletic administrators. Therefore, an extensive list of terms



has been provided. All definitions were found in Black's Law Dictionary (Black, 1991) unless stated otherwise.

Actual notice. "Notice expressly and actually given, and brought home to the party directly" (p. 733).

Adjudicate. "To settle in the exercise of judicial authority" (p. 26).

Appeal. "Resort to a superior (i.e. appellate) court to review the decision of an inferior (i.e. trial) court or administrative agency" (p. 62).

Appellant. "The party who takes an appeal from one court or jurisdiction to another" (p. 64).

Appellee. The respondent or "the party in a cause against whom an appeal is taken" (p. 64).

Assault. "Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability so to do, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm" (p. 75).

Authority. "Refers to the precedential value to be accorded an opinion of a judicial or administrative body. A court's opinion is binding authority on other courts directly below it in the judicial hierarchy" (p. 89).

Battery. "Intentional and wrongful physical contact with a person without his or her consent that entails some injury or offensive touching" (p. 104).

Breach of contract. "Failure, without legal excuse, to perform any promise which forms the whole or part of a contract" (p. 130).

CALR. Computer-assisted legal research. Electronically accessible legal indexes and "retrieval mechanisms." Two systems, LEXIS and WESTLAW, are commercially available (Rombauer, 1991, p. 276).

Case law. "The aggregate of reported cases as forming a body of jurisprudence, or the law of a particular subject as evidenced or formed by the adjudicated cases" (p. 148).

Cause of action. "The fact or facts which give a person a right to judicial redress or relief against another" (p. 152).

Complaint. "The pleading which sets forth a claim for relief" (p. 196).

Consideration. "The cause, motive, price, or impelling influence which induces a contracting party to enter into a contract" (p. 211).

Constructive notice. "Information or knowledge of a fact imputed by the law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it" (p. 733).

Contract. "An agreement between two or more persons which creates an obligation to do or not to do a particular thing" (p. 224).

Damages. "Monetary compensation awarded by a court for an injury caused by the act of another" (Wong, 1994, p. 773).

Defamation. "An intentional false communication, either published or publicly spoken, that injures another's reputation or good name" (p. 288).

Defendant. "The person defending or denying; the party against whom relief or recovery is sought in an action or suit" (p. 290).

Dictum. "An abbreviated form of *obiter dictum*, 'a remark by the way;' that is, an observation or remark made by a judge in pronouncing an opinion upon a cause...Dicta are opinions of a judge which do not embody the resolution or determination of the specific case before the court" (p. 313).

Due process of law. "It is concerned with the guarantee of every person's enjoyment of his rights (e.g., the right to a fair hearing in any legal dispute)" (Wong, 1994, p. 773).

Enjoin. "To require; command; positively direct (p. 366).

Equity. "Justice administered according to fairness as contrasted with the strictly formulated rules of common law" (p. 374).

Fraud. "An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right" (p. 455).

Holding. "The legal principle to be drawn from the opinion (decision) of the court" (p. 504).

Injunction. "A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury" (p. 540).

Jurisdiction. "Power and authority of a court to hear and determine a judicial proceeding; and power to render particular judgment in question" (p. 594).

LEXIS. "The pioneering computerized full text legal research system of Mead Data Central" (Wong, 1994, p. 776).

Liability. "The condition of being responsible either for damages resulting from an injurious act or for discharging an obligation or debt" (Wong, 1994, p. 776).

Libel. "A method of defamation expressed by print, writing, pictures, or signs. In its most general sense, any publication that is injurious to the reputation of another" (p. 632).

Litigate. "To settle a dispute or seek relief in a court of law; to carry on a lawsuit" (p. 645).

Litigation. "A lawsuit. Legal action, including all proceedings therein" (p. 645).

Negligence. "The failure to use such care as a reasonably prudent and careful person would use under similar circumstances" (p. 716).

Opinion. "The statement by a judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based" (p. 754).

Plaintiff. "A person who brings an action; the party who complains or sues in a civil action" (p. 796).

Precedent (Stare decisis). "An adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law" (p. 814).

Quid pro quo. This for that. "The mutual consideration which passes between the parties to a contract" (p. 867).

Ratio decidendi. "The ground or reason of decision" (p. 872).

Remand. "The act of an appellate court when it sends a case back to the trial court and orders the trial court to conduct limited new hearings or an entirely new trial, or to take some other further action" (p. 896).

Respondeat superior. A doctrine which states "an employer is liable for injury to person or property of another proximately resulting from acts of employee done within scope of his employment in the employer's service" (p. 909).

Respondent. "The party against whom the appeal is taken, *i.e.* the appellee" (p. 909).

Restraining order. "An order in the nature of an injunction which may issue upon filing of an application for an injunction forbidding the defendant from doing the threatened act until a hearing on the application can be had" (P. 911).

Reversal. "The annulling or setting aside by an appellate court of a decision of a lower court" (p. 915).

Slander. "Oral defamation; the speaking of false words tending to prejudice another in his reputation, community standing, office, trade, business, or means of livelihood" (p. 966).

Slip opinion. "An individual court decision published separately soon after it is rendered" (p. 967).

Statute. "A formal written enactment of a legislative body" (p. 981).

Tort. "A private (or civil) wrong or injury, other than breach of contract, suffered by an individual as the result of another person's conduct" (Wong, 1994, p. 348).

Vacate. "To annul; set aside; to cancel or rescind. To render an act void." (p. 1075).

Vicarious liability. "The imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons" (p. 1084). *See also* Respondeat superior.

Writ of certiorari. "An order by the appellate court which is used by that court when it has discretion on whether or not to hear an appeal from a lower court" (p. 1109).

Wrongful death action. "Type of lawsuit brought on behalf of a deceased person's beneficiaries that alleges that death was attributable to the willful or negligent act of another" (p. 1110).

### Research Questions

1. Based on an identification and classification protocol, what are the prevailing areas of litigation against intercollegiate athletic departments or department members in the 1990s?
2. Based on a thorough analysis of identified cases, what are the resulting court rulings and judicial rationale within the prevailing areas of litigation?
3. What, if any, common themes or trends emerge from the synthesis of opinions and rulings within each of the prevailing areas of litigation?

## CHAPTER II

### REVIEW OF LITERATURE

The literature review for this study was organized into five sections. First, a brief overview of American court systems and a discussion of courts' authority was presented. Next, an examination of emerging trends in sport litigation was provided. Lastly, the final three sections of the literature review provided a comprehensive discussion of each of the major areas of law with which this study was concerned. The major areas of law, and corresponding sections in the literature review, were (a) gender equity, (b) contract law, and (c) tort liability.

#### American Court Systems

Wong (1994) emphasized the importance for administrators of amateur athletic organizations to gain a "fundamental understanding of the legal system in the United States to deal effectively with the wide variety of legal matters they face today" (p. 38). Therefore, a brief overview of the American court system and a discussion of courts' authority was included in the literature review.

Rombauer (1991) reported that 51 court systems operate in the United States, consisting of one federal court system and one system for each



state. Rombauer stated that each system has a similar structure and operates independently from other systems except under limited circumstances.

Wong (1994) stated that the federal system and most state systems consist of a three-tiered court system. Rombauer (1991) described the trial court or court of original jurisdiction as the first court in which a legal dispute may be contested. In the federal system, this court has been called the district court. In state court systems, the trial court has most commonly been referred to as the district court, circuit court, or superior court (Rombauer).

Wong (1994) reported the intermediate reviewing courts as the second tier in most systems. In the federal system, this appellate court has been named the United States Court of Appeals, of which there are 13. Rombauer (1991) reported that approximately two-thirds of the states have an intermediate appeals court, while the remaining one-third allow parties to appeal directly to the highest court in the state. Rombauer added that most appellate courts do not receive evidence or review questions of fact, but rather, only review questions of the lower court's application or interpretation of law.

The highest appellate court in each system is, as Wong (1994) stated, "the ultimate dispute arbitrator" (p. 39). The United States Supreme Court is the highest court in the nation and it has been mandatory for lower federal courts to rule consistently with its decisions (Wong).

The entire American legal system has been grounded primarily in the common law framework established in England (Wong, 1994). Wong stated that this common law influence is a result of colonial America's reliance on English law and custom. Wong added that common law differs from statutory law in that it relies heavily on precedent and legal custom. K. A. Davis (1994) stated that every state court system in the nation, with the exception of the Louisiana system, relies heavily on common law doctrine.

Rombauer (1991) stated that the doctrines of *stare decisis* and precedent are the forces at work in a common law system. Rombauer described *stare decisis* as a doctrine which states that a court will generally follow its own decisions, and that lower courts are expected to rule consistently with courts to which they are subordinate. The doctrine of precedent was described by Rombauer as a situation in which a decision by a court regarding a particular issue is worthy of consideration by other courts when deciding similar cases.

When the above complimentary doctrines are combined, Rombauer (1991) stated that two types of authority value, mandatory and persuasive, are created for judicial decisions. Rombauer characterized mandatory authority as decisions "that a court should generally deem itself bound to follow" (p. 36) and persuasive authority as decisions "that a court should consider and may be persuaded to follow" (p. 36). Rombauer added that mandatory authority is only mandatory in the sense that the decision must

be followed when the precedent-setting case is "directly in point" (p. 37) with the current case. Directly in point was described by Rombauer as meaning, (a) the central question to be resolved in the current case is the same as in the precedent case, (b) resolution of that question was key to resolving the precedent case, (c) the significant facts are similar in both cases, and (d) no additional significant facts appear in the current case which were absent from the precedent case.

#### Trends in Sport Litigation

A renowned legal scholar once quipped that our national motto "be changed from 'In God We Trust' to 'Sue the Bastard'" (Nolte, 1979, p. 2). When relating this litigious trend to the world of sports, Nolte argued that this "generation of sports administrators is reaping the whirlwind sown by the civil rights movement in this country, which has resulted in our living under judge-made rather than statutory law, minority rather than majority law, litigation instead of legislation" (p. 1).

While this increase in litigation has been adequately documented, as highlighted in Chapter I of this study, a few authors (H. Appenzeller, 1985a; K. A. Davis, 1994; Horine, 1985; Rushing, 1986/1987) have also identified emerging trends in sport-related litigation. K. A. Davis listed five trends of which sport administrators should be aware:

1. The average citizen is better informed of his or her legal rights and much more aware of legal recourse available to secure compensation for damages.
2. People are aware of the "deep pocket" theory and will name multiple defendants in order to increase their chances at collecting monetary damages.
3. Plaintiffs are increasingly claiming they were not adequately informed of the risks associated with a particular activity.
4. Suits resulting from improper instruction, supervision, and equipment are increasing.
5. The courts have consistently ruled in favor of increasing the protection of individual rights.

H. Appenzeller (1985a) added the following trends:

1. State legislatures have modified governmental immunity doctrines, increasing the liability of government agencies.
2. More states have replaced the doctrine of contributory negligence with one of comparative negligence, allowing plaintiffs to recover damages even when found to be partially at fault.
3. Courts have consistently placed more responsibility and accountability on sport administrators and are holding them "to a higher standard of care in the operation of their programs" (p. 295).

Horine (1985) identified trends which he believes contributed to the increase in litigation. Horine first pointed to "sweeping changes in the interpretation of product liability as it relates to sport equipment." The availability of free or pre-paid legal services, as well as attorneys accepting cases on a "contingency-fee basis" (p. 67) were also identified by Horine as trends which make litigation more viable and attractive to potential plaintiffs. Lastly, Horine argued that individuals are tempted to file suits because of the insurance companies' eagerness to settle out of court.

A final trend identified by several authors (H. Appenzeller, 1985a; Horine, 1985; Rushing, 1986/1987) is the increase of lawsuits filed under constitutional law. Rushing stated that under Section 1983 of the Civil Rights Act of 1871, a student-athlete can sue an institution and the state if his or her constitutional rights are violated. Rushing added that this was a growing practice among student-athletes. Horine elaborated further, stating that public law or law "based on constitutional provisions" (p. 80) has become the favored path to pursue sport-related suits. Horine argued that because private law disputes are usually based on a "disagreement over binding rules and regulations" (p. 80), courts have been more reluctant to intervene. Public law disputes, however, have been based on constitutional issues on which the courts are compelled to rule.

### Gender Equity

Title IX of the Education Amendments of 1972 stated "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" (Education Amendments of 1972, p. 373). Although intercollegiate athletics is where Title IX has created the greatest debate recently, the legislation was not specifically directed at athletics. The statute was drafted to address discrimination throughout an entire educational institution (Judge, O'Brien & O'Brien, 1995). For the purpose of this study, however, literature dealing with gender equity and its relationship to intercollegiate athletics was reviewed.

Great confusion has surrounded the entire issue of gender equity in intercollegiate athletics. Henderson (1995) argued that the confusion surrounding gender equity and the divisiveness it has created can be attributed, in part, to the many definitions and methods of interpreting exactly what constitutes gender equity. The criteria for determining compliance with Title IX has been a dynamic and evolving issue in itself. The National Collegiate Athletic Association (NCAA) Gender-Equity Task Force provided the following definition of compliance:

An athletics program can be considered gender equitable when the participants in both the men's and women's sports programs would

accept as fair and equitable the overall program of the other gender. No individual should be discriminated against on the basis of gender, institutionally or nationally, in intercollegiate athletics. (Achieving Gender Equity, 1994, p. 1)

Before one is able to fully understand Title IX and its legal ramifications, this author felt it was imperative that one receive a brief overview of the historical development of Title IX. Therefore, the first two sub-sections of the gender equity section of the literature review traced the legislative and administrative history as well as the judicial history of Title IX. The literature review was next divided into sub-sections discussing the impact Title IX has had on intercollegiate athletics and possible implementation strategies to comply with Title IX directives.

#### Legislative and Administrative History

Anderson (1989/1990) thoroughly traced the legislative history of Title IX and stated that its impetus was from women's rights groups and women involved in higher education. Anderson gave extensive details of Title IX's origins in a United States House of Representative subcommittee in 1970 through its introductions in the House and Senate as separate bills in 1971. She then described the final bill which came out of conference committee and was subsequently signed into law by President Nixon on June 23, 1972. Anderson stated that Title IX added to Title VII of the Civil Rights Act of 1964, the Public Health Service Act, and the Equal Pay Act in their

protection against sex discrimination, and extended this protection to educational institutions which had a history of discrimination.

Implementation regulations. Developing implementation regulations was the responsibility of the Department of Health, Education, and Welfare (HEW) and enforcement authority was given to the Office for Civil Rights (OCR) (Anderson, 1989/1990). The final implementing regulations were issued by HEW on July 21, 1975 (Bonnette, 1994). Anderson described these regulations as consisting of four major segments: "the general prohibition against sex discrimination, separate teams, equal opportunity and an adjustment period" (p. 221). These regulations stated that high schools and colleges had until July of 1978 to comply with Title IX directives (Petriella, 1994).

The problem with the regulations was that they failed to adequately define many of the ambiguities in the language of Title IX (Staff, 1978). Anderson (1989/1990) added that the regulations' ambiguous terms, sweeping definitions of financial assistance as it relates to programs, and unclear criteria for equal opportunity acted as catalysts for tremendous debate over compliance well into the 1980s.

Two questions surrounding Title IX implementation and application continually arose. First, did Title IX apply to entire institutions or only those programs directly receiving federal funds? Secondly, were athletic programs intended to be included in Title IX directives? Initially, the answers to these



questions were not evident because of the ambiguity of the statute's wording and the unclear intent of Congress (Staff, 1978). Heckman (1992) stated "Title IX was handicapped from its inception, primarily because little legislative history surrounding the enactment is available" (p. 9).

Anderson (1989/1990) stated that HEW initially interpreted coverage of Title IX to any educational activity or program which "receives or benefits from" (p. 217) federal funds. Anderson argued that this "benefit theory" was derived from the opinion in Bob Jones University v. Johnson (1974), a civil rights case which established the fact that federal funds given directly to students eventually make their way into all institutional programs, making them recipients of federal funding. Thus, all programs at an institution receiving federal funds would be subject to Title IX enforcement (Anderson).

Anderson (1989/1990) contended that this interpretation exceeded the language of Title IX which suggested only programs directly receiving federal aid were subject to compliance. Krakora (1983) reported that the original bill introduced in the Senate was clearly worded to include all programs at an institution receiving federal funds under the Title IX umbrella. Krakora continued by stating that the final version of the bill, however, did not contain such language. This intentional omission, Krakora argued, may indicate an intent by Congress to favor a programmatic applicability. The debate of programmatic versus institutional compliance has since been

carried out in the courts and has been outlined in the judicial history section of this literature review.

The debate as to whether athletics was included under Title IX was quite heated as well. Before issuing the final implementation regulations, HEW opened a four-month comment period on the proposed regulations to solicit feedback (Anderson, 1989/1990). Anderson reported athletics as being the primary topic of the inputs, prompting Secretary of HEW Caspar Weinberger to proclaim at a press conference, "athletics . . . is without question the most important issue before the American public today" (Anderson, p. 220).

Anderson (1989/1990) stated that Congress's intent for athletics to be covered under Title IX is unclear. Throughout the Congressional debates, the term athletics was only mentioned twice (Anderson). Krakora (1983) disagreed, pointing to several Senate proposals to exclude athletics from Title IX mandates which failed to gain adequate support for passage. Krakora argued that this evidence, together with the passage of Section 844 of the Education Amendments of 1974 which required HEW publication of athletic regulations, clearly demonstrates that "Congress envisioned some relationship between athletics and Title IX" (p. 224).

There was no ambiguity in HEW's interpretation of Title IX's application to athletics (Anderson, 1989/1990). Regulations for enforcement clearly included athletics, as HEW paralleled court rulings under Title VI of the Civil

Rights Act of 1964 which determined athletics as an "integral part of the total educational program" (Anderson, p. 220).

Anderson (1989/1990) stated that because enforcement regulations were not finalized until three years after Title IX was signed into law, a huge backlog of unresolved complaints developed. Greater delays evolved when HEW placed a 12-month moratorium on Title IX investigations involving intercollegiate athletics complaints as it developed the final Policy Interpretation (Anderson). The Policy Interpretation was intended to clarify Title IX requirements for intercollegiate athletics (Heckman, 1992; Judge et al., 1995; Wong, 1989). After the final Title IX Policy Interpretation was issued on December 11, 1979, resolutions to complaints were still delayed (Heckman, 1992; Petriella, 1994). Investigation manuals had to be written by OCR, and significant restructuring was necessary when HEW was split into the Department of Health and Human Services (HHS) and the Department of Education (DOE) (Anderson). OCR retained its responsibility for Title IX enforcement while reporting to DOE, but didn't complete its first Title IX complaint investigation until April 20, 1981 (Anderson). The result was that not a single institution's federal funding was terminated in the 1970s due to Title IX violations (Anderson).

The Policy Interpretation. The development of the Policy Interpretation in 1979 was a significant step in an attempt to shed more light on Title IX compliance requirements of intercollegiate athletic departments (Heckman,

1992; Judge et al., 1995). The Policy Interpretation addressed three areas of an athletic program in which to assess compliance with Title IX (Henderson, 1995; Wilde, 1994a, 1995). Wilde (1994a, 1995) listed these three areas as (a) athletic financial assistance, (b) other non-financial program areas, and (c) effective accommodation of student interests and abilities. Judge et al. stated that a compliance investigation may assess one or all of the above areas in determining an institution's compliance. The following discussion was included to provide a brief summary of what has constituted compliance in each of these three assessment areas.

Athletic financial assistance has been "defined as aid awarded by the institution on the basis of athletic participation" (Judge et al., 1995, p. 320). Judge et al. argued that scholarship dollar amounts awarded to each gender need not be equivalent. Rather, scholarship aid must be "proportionate to the number of students of each sex participating in inter-collegiate athletics" (Judge et al., p. 320). Anderson (1989/1990) characterized the abandonment of an equal spending criteria in favor of an equivalent spending criteria as the most significant development from the Policy Interpretation. Judge et al. also noted that there are certain non-discriminatory factors, such as out-of-state tuition rates, which may be present that would allow an institution to maintain a disparity in scholarship amounts.

Non-financial program compliance has been assessed through examination of 11 distinct components which range from equipment and facilities to travel and per diem allowances (Wilde, 1994b). Wilde stated that "Title IX regulations require an institution to provide its athletes with equitable treatment, benefits and opportunities in eleven enumerated areas" (p. 48).

Compliance with this requirement has been determined after each program component has been reviewed individually and then combined to compare the men's and women's programs as a whole (Judge et al., 1995). Judge et al. further noted that unique aspects of particular sports as well as factors associated with operating a single-gender sport may act as mitigating factors if an unbalance exists, provided these factors do not create an overall imbalance in the programs.

The third area in which compliance is assessed was defined by the Policy Interpretation as effective accommodation of athletic interests and abilities of all students (Wilde, 1994b). More specifically, compliance in this area has been assessed by analyzing both gender's participation opportunities and levels of competition (Bonnette, 1994). Participation opportunities have been analyzed by means of a three-step test outlined in the Policy Interpretation (Judge et al., 1995; Wilde, 1994b). Levels of competition have been analyzed through the use of a two-part test (Bonnette).

The three-step test used to analyze participation opportunities is the test which Bonnette (1994) claimed "focuses on the most serious, and one of

the most common, of compliance problems" (p. 9). The first step has been to determine whether an institution's participation opportunities for male and female students are "substantially proportionate to their respective enrollments" (Judge et al., 1995, p. 324). Judge et al. stated that courts have applied a strict interpretation of this proportionate requirement. If it was determined that one sex has been underrepresented, then the next step requires an inquiry into the institution's history of program expansion for the underrepresented sex. If an institution fails to show a history of program expansion for the underrepresented sex, the next step is to require the institution to demonstrate that the underrepresented students' interests and abilities have been fully and effectively accommodated by the current program (Bonnette; Judge et al; Wilde, 1994b). When an institution has been able to demonstrate compliance with any of these three tests, it has been determined to be in compliance with the participation opportunities portion of the compliance assessment (Bonnette).

Institutions generally have had little difficulty complying with the two-part test for levels of competition (Bonnette, 1994). Bonnette contended that this is because most institutions have their "women's and men's teams competing at the same division level" (p. 9). The first option for an institution to demonstrate compliance has been to provide substantially proportionate competitive opportunities for its male and female athletes. The second option has been to "demonstrate a history and continuing practice of

upgrading the competitive opportunities available to the historically disadvantaged sex" (Bonnette, p. 10) As with the participation opportunities criteria, an institution has needed to meet only one of the above tests to demonstrate compliance (Bonnette).

Effective accommodation of athletic interests and abilities has been the one aspect of Title IX compliance in which most recent litigation has been focused (Judge et al., 1995). Heckman (1992) argued this factor to also be the most important. Only by selecting sports and levels of competition which effectively accommodate the interests and abilities of female student-athletes, Heckman reasoned, will significant progress be made towards providing women with "greater athletic opportunities" (p. 45).

While compliance issues can still be confusing, there were a number of persistent questions which were answered through the Title IX Policy Interpretation. Wong and Barr (1992) stated that the Policy Interpretation implies it to be more appropriate to compare complete men's and women's programs at an institution versus comparing specific teams. Judge et al. (1995) stated that it is clear that "strict numerical equality among the sexes" (p. 316) is not required. Therefore, the authors argued that compliance cannot be based solely on proportionate representation of an institution's athletes to its student body (Judge et al.). Additionally, Judge et al. stated that an institution will not be considered in non-compliance if it fails to expend equal funds on each gender. This spending disparity may,

however, be considered when assessing the overall programmatic opportunities provided for each gender (Judge et al.; Staff, 1978). As Vargyas (1992) stated, "expenditure levels are still highly probative of the question of compliance" (p. 78).

The Civil Rights Restoration Act. Although the Policy Interpretation clearly strengthened Title IX enforcement procedures, Anderson (1989/1990) noted that there were ominous signs on the horizon for Title IX in the early 1980s. Budget cuts dipped into OCR staffing, legal and legislative challenges to the enforcement mechanisms increased, and the Reagan Administration planned to weaken enforcement procedures.

Anderson (1989/1990) stated that Title IX's fortunes were reversed, however, through persistent lobbying by civil rights activists who persuaded Congress to legislatively endorse the institutional rather than the programmatic approach to interpretation. In January, 1988, Congress declared institution-wide interpretation of the four anti-discrimination statutes with the Civil Rights Restoration Act (Anderson; George, 1993).

Although the Civil Rights Restoration Act was intended to reverse the impact of the Grove City College v. Bell (1984) decision, which applied the programmatic approach to compliance, Leatherman (1988) stated the debate over its passage was much more complex. Tertiary issues, such as federally funded abortions and religious control of institutions created divisions that threatened the bill's passage (Leatherman). Enough support was



garnered, however, to not only pass the bill but to override President Reagan's veto in March of 1988 (Anderson, 1989/1990; Wong, 1994).

The Civil Rights Restoration Act provided a more powerful vehicle for women to address grievances under Title IX, and clearly opened the door for a new wave of Title IX complaints and litigation. (Schubert, Schubert, & Schubert-Madsen, 1991; Schubert-Madsen, Schubert, & Schubert, 1991; "Women's Athletics," 1988). One article reported that 15 Title IX complaints were filed against intercollegiate athletic departments in the eight months immediately following the signing of the Civil Rights Restoration Act ("Women's Athletics"). Schubert et al. argued that prior to enactment of the Civil Rights Restoration Act, it was prudent for women to file complaints under as many applicable legal doctrines as possible. This strategy protected plaintiffs from "a summary judgment decision by a judge who was reluctant to interfere in the educational process" (Schubert et al., p. 267). The Civil Rights Restoration Act negated the need for such a strategy as it gave women a clear avenue of relief for gender discrimination in intercollegiate athletics (Schubert et al.).

Many authors have argued that more legislative and administrative action needs to be taken to ensure compliance with the spirit of Title IX (Heckman, 1992; Henderson, 1995; Wilde, 1994a). Henderson argued for federal legislation that would pressure institutions into Title IX compliance. Wilde reported that a pending bill in the United States House of

Representatives, the Equity in Athletics Disclosure Act, was drafted to force institutions receiving federal funds to annually disclose gender equity data as it relates to athletics. Henderson argued that this bill would force institutions to conduct annual reviews of their programs and act as "a negative incentive that will surely press universities into compliance with gender equity mandates" (p. 158).

### Judicial History

Most early Title IX suits targeted at athletics involved high school programs (Anderson, 1989/1990). A majority of these early suits centered on the legality of separating teams by gender, and rulings tended to differ greatly by state and circumstance. Many courts were reluctant to hear suits under Title IX and instead tried many of them under anti-discrimination laws (Anderson). This reluctance was primarily a result of the fact that it was unclear if a private right of action, or statutory permission for individual citizens to "enforce federal law" (Lieberman, 1977, p. 61), existed under Title IX (Anderson; Staff, 1978).

Title IX gradually became an effective tool to fight gender discrimination in athletics. The initial focus of OCR enforcement of Title IX was on interscholastic organizations and, because of a variety of motivating factors, school districts began voluntarily moving towards compliance (Anderson, 1989/1990). However, a private right of action had still not been established for individuals seeking redress (Staff, 1978).

Private right of action. Finally, in 1979, the United States Supreme Court ruled on Cannon v. University of Chicago (1979) which affirmed an individual's right to litigate under Title IX (Anderson, 1989/1990). Cannon sued the University of Chicago and its policy of not admitting students to their medical schools who were over 30 years old and did not possess an advanced degree. The Supreme Court held that Cannon had an implied right of action and did not have to attempt all administrative remedies before filing suit (Anderson). Specifically, the Supreme Court ruled "that although Title IX does not expressly provide for an aggrieved individual's right to commence a federal lawsuit, there is an implied right by a citizen to commence a Title IX action" (Heckman, 1992, p. 20). By recognizing an individual's private right of action in Cannon, Boundy (1981) argued that the Supreme Court "found an alternative, more effective means of seeking redress for individual claims" (p. 1052) of sex discrimination.

Although Cannon established a private right of action under Title IX, the case itself had absolutely nothing to do with athletics. Therefore, the pressing issues involving athletics under Title IX, such as programmatic or institutional compliance, separate team equity, and opportunity definitions, remained unresolved. Plaintiffs were, therefore, required to establish that Title IX did, in fact, apply to athletics (Anderson, 1989/1990).

Institutional versus programmatic approach. Institutions of higher education named as defendants in early Title IX suits initially argued that

athletic departments were beyond the scope of Title IX. Institutions argued indirect aid did not qualify as federal assistance and only specific departments receiving federal funds could be held to compliance. Plaintiffs, on the other hand, argued that any program in an institution receiving federal funds benefited from those resources and was therefore subject to punitive actions for non-compliance (Anderson, 1989/1990).

This debate was defined in the courts by two early cases. In Haffer v. Temple University (1982, 1987), the United States Court of Appeals for the Third Circuit ruled that an intercollegiate athletic program was required to comply with Title IX mandates even if it received no direct federal financial assistance (Petriella, 1994). Specifically, the Haffer opinions stated that, although Temple's athletic department received no direct financial assistance, the granting of athletic scholarships allowed "the institution to administer federal funds in a way that the institution had previously been unable to do" (Schubert-Madsen et al., 1991, p. 241). Because the institution's use of federal funds was affected by the athletic department, the athletic programs were therefore required to comply with Title IX directives (Schubert-Madsen et al.). Haffer had a long judicial history, caused in part by "changing interpretations of sex discrimination laws" (Wong, 1988a, p. 170) which invalidated "Haffer's broad interpretation of the scope of Title IX" (Petriella, p. 609). The case was eventually settled out of court after

Congress passed the Civil Rights Restoration Act which effectively negated Temple's argument ("Women's Athletics," 1988).

In Grove City College v. Bell (1984), the United States Supreme Court effectively rejected the earlier Haffer decision's institutional approach to compliance and declared that Title IX compliance was required only of those programs directly benefiting from federal funds (Petriella, 1994). The majority opinion stated that federal aid to students at an institution does not require the entire institution to comply with Title IX mandates (Anderson, 1989/1990). Anderson highlighted the dissenting justices' opinion as arguing the program-specific ruling permitted "institutions to discriminate in programs which did not receive federal financial assistance" (p. 271). Ironically, it was the Third Circuit Court decision of Grove City College v. Bell (1982), which the Supreme Court affirmed but modified, that was cited as mandatory authority for the Haffer decision and the adoption of an institutional approach to compliance (Krakora, 1983).

Anderson (1989/1990) argued that the Grove City decision dramatically slowed compliance progress in educational institutions. Wong (1988a) reported that "at least 23 Title IX investigations of intercollegiate athletic programs were dropped as a result of the Grove City decision and many more were narrowed in scope" (p. 16).

Compensatory damages. Another seminal Title IX case heard by the United States Supreme Court was Franklin v. Gwinnett County Public

Schools (1992). The Haffer case had already established that a Title IX violation can be established without the plaintiff demonstrating discriminatory intent on the part of the defendant (Petriella, 1994). Franklin addressed the question of compensatory damages under Title IX when intentional discrimination is alleged. The Supreme Court reversed the United States Court of Appeals for the Eleventh Circuit by ruling that compensatory damages may be awarded under Title IX when intentional discrimination is demonstrated (Heckman, 1992). Although Title IX contains no provision for compensatory damages to remedy discrimination, the Franklin majority opinion cited a "long line of cases in which the Court has held that if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief" (Franklin v. Gwinnett County Public Schools, 1992, p. 219).

Although Franklin was a case involving a public school system, Heckman (1992) argued that this ruling "should have a considerable impact for Title IX" (p. 25). Heckman predicted that the potential for monetary damages, as established in Franklin, will serve as a more effective deterrent to non-compliance than the hallow threat of federal funds termination.

#### Impact of Title IX

Gender equity and the application and scope of Title IX has long been a confusing issue to sport administrators and scholars alike. In 1985, after a series of Title IX judicial setbacks, Horine incorrectly predicted that "the

legal extensions of Title IX will continue to shrink" (p. 89). Horine cited the fact that the American Council on Education recommended that discussions be held by the Vice President of the United States on dismantling Title IX.

In all fairness to Horine, he could not have foreseen the reversal of fortunes for Title IX with the enactment of the Civil Rights Restoration Act in 1988 which "restored the power to Title IX legislation" (Wong, 1994, p. 513). Judge et al. (1995) recently illustrated the force of Title IX with the following characterization: "Instead of being simply an anti-discrimination statute, Title IX is being transformed into a judicial mandate for affirmative action" (p. 326).

Athletics has remained a primary and growing target of Title IX complaints (Blum, 1993; Wong & Barr, 1993a, 1994a, 1994b). Blum cited DOE statistics which identified more than 6,000 total Title IX complaints between fiscal years 1980 and 1993. Of the 6,000 complaints, which included elementary and secondary schools as well as institutions of higher education, more than 1,000 complaints were in the area of athletics (Blum).

Contrary to what Horine (1985) predicted, legal extensions of Title IX as it applies to athletics have not shrunk, but have actually expanded to also cover compensation of intercollegiate athletics coaches (Wong & Barr, 1993a). Wong and Barr reported that a District of Columbia Superior Court ruling awarding Sanya Tyler, a women's basketball coach and associate athletic director at Howard University, \$1.114 million in back pay and

damages was the first time Title IX had been argued successfully in such a case. Although only a trial court decision, Wong and Barr argued that this decision "will likely open the door for other equal-pay cases" (p. 14). This prediction was later validated as Wong and Barr (1994a, 1994b) reported litigation in this area to be on the rise. Wong and Barr added that the case law, although evolving, was "far from clear on the subject so far" (1994a, p.12).

Judge et al. (1995) maintained that gender equity cases filed under Title IX hit at the heart of the dilemma between federal mandates requiring gender equity and government's reluctance to "interfere with a university's discretionary use of declining resources" (p. 314). This tenuous relationship, and the difficulty resolving it, was addressed in the Cohen v. Brown University (1993) opinion:

The beacon by which we must steer is Congress's unmistakably clear mandate that educational institutions not use federal monies to perpetuate gender-based discrimination. At the same time, we must remain sensitive to the fact that suits of this genre implicate the discretion of universities to pursue their missions free from governmental interference and, in the bargain, to deploy increasingly scarce resources in the most advantageous way. (p. 907)

Lederman (1994) stated that opponents of how the courts have resolved this issue, specifically Brown University, argue that instead of "obligating



colleges to 'fully' meet the interests of female students . . . Title IX actually requires institutions to 'equally' accommodate the interests and abilities of their women *and* men" (p. A52). Proponents of recent interpretations have said Title IX enforcement has acted as a "springboard for providing amateur athletics programs for females in this country" (Heckman, 1992, p. 62).

Avenues of redress. Heckman (1992) and Henderson (1995) outlined various avenues for complainants to seek redress for Title IX violations. Both authors noted that an individual may file an internal grievance with the institution in which the alleged violation has occurred. Alternative options included initiating an administrative complaint with the OCR, or "commencing a federal lawsuit" (Heckman, p. 14; Henderson, p. 139).

Wilde (1994a) stated that the OCR, because of its responsibility for enforcing Title IX compliance, can conduct reviews of institutions named in complaints or of unnamed institutions selected at random. Wilde added that the OCR can take a series of actions against an institution in non-compliance, culminating with the DOE terminating the institution's federal financial assistance. This has not proven to be a common practice however, as Henderson (1995) reported that the OCR "has never imposed any penalties in a Title IX college sports case" (p. 159).

As noted in the judicial history section of this literature review, redress via litigation has become an increasingly effective route for complainants. The United States Supreme Court has recognized an implied right of action

under Title IX which allows "injunctive relief and possibly compensatory damages if discrimination . . . is proven intentional" (Petriella, 1994, p. 599). Victorious plaintiffs have also been entitled to attorney's and other legal fees. (Vargyas, 1992).

Judge et al. (1995) argued that the injunctive relief and the damages awarded to plaintiffs in Title IX cases has led to two major developments. First, it has encouraged litigation by potential plaintiffs who, until recently, had little hope of prevailing. Secondly, it has acted as a catalyst by providing economic incentives to institutions to restructure their athletic programs before being ordered to do so by the courts.

Petriella (1994) argued that the practice of issuing an interim injunction to reinstate varsity status to women's teams either eliminated or demoted to club status is the most appropriate judicial remedy. This not only avoids compensatory damage awards, but also "provides a more appropriate, timely remedy to a very personal injury" (p. 630).

Actual litigation has not been the only factor driving change. Blum (1993) stated that between 1990 and 1992 there were four universities that reinstated previously eliminated varsity women's programs in response to the threat of litigation. The Executive Director of Trial Lawyers for Public Justice stated that most institutions are defenseless against Title IX suits, "That is why schools we threatened decided not to litigate. And why the ones which we have sued are losing" (Blum, p. 30).

Progress towards gender equity. Even with the enactment of the Civil Rights Restoration Act and favorable recent court rulings, many authors have maintained that not enough progress has been made towards achieving gender equity (George, 1993; Henderson, 1995; Vargyas, 1992; Wilde, 1994a). Vargyas argued that the disparity in participation and funding levels between men's and women's athletics is still significant at the high school and college level. Vargyas pointed to the fact that high schools "offer approximately twenty five thousand fewer teams nationwide to girls than to boys" (p. 74) as a major factor in the "enormous discrepancy" (p. 74) between female enrollment and participation.

Wilde (1994a) cited NCAA figures released in 1992 which showed that women composed 30.9% of all student-athletes and women's Division I programs received an average of 23.9% of athletic department funds in 1991. Wilde contended that these numbers were not significantly better than those in 1984 when 30.8% of all athletes were women, and women's Division I program expenditures comprised 18% of athletic department budgets. Vargyas (1992) reported that the 18% expenditure on women's programs by Division I institutions went unchanged through 1989.

Henderson (1995) maintained that enactment of Title IX has actually led to a decrease in "female representation in athletic leadership positions" (p. 145). Henderson explained that this is a result of the elimination of the dual system collegiate athletic department and the merger of men's and women's

programs under one administrator. Vargyas (1992) illustrated this fact by stating that 90% of all collegiate women's programs were run by women in 1972, compared to only 16% in 1988. Henderson continued by stating that not only were these administrative positions filled predominantly by men, but an increasing number of male coaches were coaching women's sports as well. Again, Vargyas cited the fact that while 90% of all collegiate women's teams were coached by women in 1972, less than 50% were coached by women in 1988. This phenomenon developed, according to Henderson, as "the status of coaching women's athletics rose to closely mirror the status of men's varsity athletics" (p. 146). She further contended that the "'good old boy' network" (Henderson, p. 146) has resulted in women being "steadily and effectively squeezed out of the key responsibilities of coaching and directing athletic programs" (Henderson, p. 146).

In a unique case study of gender equity at a Division I university, George (1993) examined the University of Colorado's men's and women's basketball program to determine the progress made under Title IX. George admitted that examining Colorado's basketball programs in isolation would not reveal the state of gender equity nationwide, or even at the University of Colorado for that matter. She did state, however, that the University of Colorado was "essentially on par with . . . the national averages" (p. 558) as they relate to gender equity, and basketball was the only sport where Colorado had separate parallel programs for men and women. George felt

that examining two programs of the same sport, located at the same institution, which compete in the same conference, would allow her to assess if the "promise and spirit of Title IX" (p. 561) had been realized.

George (1993) discovered that the "promise and spirit of Title IX" (p. 561) had not been met, specifically noting four areas of great budget disparities. These areas were equipment and supplies, training tables, recruiting expenditures, and coaches' salaries. George concluded by stating, "if athletics is, indeed, a part of our educational mission, then we have a duty to aspire to the spirit of gender equity, as well as to the letter of the law" (p. 570).

Although most authors agreed that much progress is still required to move towards gender equity, some encouraging signs were forwarded. Wilde (1994a) reported that prior to the passage of Title IX in 1972, only 15% of all intercollegiate athletes were women. By 1984, the percentage of women athletes had risen to 30.8% (Wilde). Additionally, an average of 2.5 intercollegiate sports were offered to women in college prior to Title IX. That number rose to 7.31 in 1988, with 450 new NCAA women's teams created between 1984 and 1988 alone (Wilde).

Lea and Loughman (1993) conducted a study which revealed that the number of female athletes at the respondent universities had "increased 60 percent more than the number of male participants over the past ten years" (p. 49). They added that there were 76.28% more male than female

participants in 1993 compared to 130.02% more male participants in 1983. While acknowledging that a disparity still exists, Lea and Loughman were encouraged by the apparent reduction of the previous disparity.

Reverse discrimination. One interesting development which has emerged from the impact of Title IX is the filing of reverse discrimination charges by male athletes. Most of these athletes are individuals whose programs have been eliminated by institutions in an effort to "increase the percentage of women's participation by cutting opportunities for men" (Wong & Barr, 1993b, p. 10).

Wong and Barr (1993b) asserted that men filing reverse discrimination claims under Title IX or the Fourteenth Amendment Equal Protection Clause "seem to be fighting an uphill battle" (p. 10). The authors pointed to a growing body of judicial precedent which attempts to redress historical discrimination against female athletes. Wong and Barr stated that the "concept of proportionality" (p. 10) has been used in recent decisions "as the benchmark of compliance with Title IX" (p. 10). This concept, Wong and Barr contended, makes it very difficult for male athletes to win a Title IX claim when their sports are unilaterally eliminated from a program that supports a higher proportion of male athletes, even if female athletes receive a higher percentage of scholarship funding.

While Wong and Barr (1993b) conceded their sympathy for male athletes "from a non-legal standpoint" (p. 14), they noted that the intent of Title IX

was to increase educational and athletic opportunities for females. Due to economic constraints, however, Wong and Barr stated that the practice has been to reduce opportunities for male student-athletes. Wong and Barr argued that "non-revenue men's sports--especially those without a female equivalent--seem to be the most vulnerable" (p. 14). This statement was confirmed by one report which revealed that there were 374 NCAA wrestling programs in 1980, but only 265 by 1993 ("Title IX: Gender Equity & the Future," 1994).

Climate of Title IX. Lozar and Mawson (1991) conducted a national survey of collegiate athletic directors, senior women athletic administrators, and university legal counsel to determine the extent of perceived compliance with Title IX. While the combined responses showed a perception of compliance, women administrators noted non-compliance in each of the five Title IX compliance guidelines addressed in the survey.

The overall response also indicated a preference among administrators "to work within their own administration to correct Title IX inequities" (Lozar & Mawson, 1991, p. 18). Women respondents, however, indicated more interest in encouraging student-athletes to file a lawsuit or formal complaint for non-compliance. Lozar and Mawson added that women administrators acknowledged that the fear of negative repercussions on their careers may inhibit their efforts to pursue compliance action.

Even though the risk of repercussions has existed for those individuals who file Title IX complaints; some authors have encouraged more activism nonetheless (Henderson, 1995; "Women's Athletics," 1988). One monthly newsletter included instructions on how to file a Title IX complaint ("How to File a Complaint," 1988). A senior associate for the Project on Equal Education Rights, an organization which distributes a Title IX complaint guide, stated the necessity for more Title IX complaints, "otherwise there will be arguments that we don't need this law because no one is filing complaints under it" ("Women's Athletics, p. 2). Vargyas (1992) maintained that increased legal action with regards to Title IX is inevitable stating, "There is a great deal of discontent and anger fermenting among girls and women at all levels of athletics. Increased action is sure to follow" (p. 78).

#### Title IX Implementation Strategies

Wilde (1994b) stated that the "harsh economic realities of college athletics in the 1990's are driving athletic administrators in two seemingly irreconcilable directions" (p. 47). On one hand, institutions have encouraged fiscal restraint in times of shrinking budgets while, at the same time, they have tried to deal with the pressures of expanding athletic opportunities for female student-athletes (Judge et al., 1995; Wilde, 1994a, 1994b). Wong and Barr (1993b) stated that this dilemma has led many "administrators to look towards program cuts as a way to make ends meet" (p. 14). Petriella (1994) acknowledged that this practice of Title IX compliance has been



"painfully unfair" (p. 629) to athletes of both genders whose teams have been "sacrificed to achieve the greater good of gender equity" (p. 629). One author argued that a concerted effort must be made towards creating equity without eliminating "sports which have historically and traditionally been part of intercollegiate athletics" ("Title IX: Gender Equity & the Future," 1994, p. 5).

Wilde (1994a, 1994b) has offered a comprehensive plan which would effectively accommodate the interests and abilities of both genders. Wilde argued that implementation of this "Three-for-One" plan would ensure institutional compliance with the athletic requirements of Title IX. Wilde (1994a) explained the Three-for-One plan was developed because of the imbalance in gender equity created by football programs and because of the "financial nucleus" (p. 250) football revenues provide for all programs.

Wilde's (1994a, 1994b) Three-for-One plan created two pools of sports. Pool A consisted of football and three sports offered to women only. Wilde outlined specific roster and competition requirements needed for a women's sport to be categorized in Pool A. Pool B was comprised of all other sports not included in Pool A. Pool B sports would have participant levels equal to the proportion of men and women in the undergraduate student body. Wilde stated that there could, however, be an underrepresented gender in Pool B if the institution could demonstrate full and effective accommodation of the underrepresented gender. If an institution does not sponsor football,

all sports would be included in Pool B and required to meet Pool B criteria. Wilde (1994a) maintained the Three-for-One plan, and more specifically the grouping of sports in Pool A, would "improve an institution's female athletics participation ratio and comply with the requirements of Title IX, and reaffirm the unique status of football in collegiate athletics" (p. 252).

Wilde (1994a, 1994b) outlined a five-step approach for financing the new women's programs created under the Three-for-One plan. First, Wilde stated an institution must have total support from the institution's senior administration. Wilde maintained that an economic and philosophical commitment from the university president's office is necessary to allow program expansion without sacrificing men's programs. Second, Wilde argued that athletic departments must make more of an effort to turn women's programs into revenue producers. Third, Wilde stated that institutions must garner more financial support from the United States Olympic Committee and national governing bodies for "non-revenue producing, Olympic-related programs" (1994a, p. 257; 1994b, p. 59). Fourth, Wilde urged institutions to voluntarily reduce men's sports roster sizes and travel squad sizes then redistribute the savings into women's programs. Lastly, Wilde argued for implementation of an NCAA Division I-A football playoff which the author stated could draw an estimated \$100 million in revenues. Wilde (1994a) closed by stating that "football, long the sticking point in the gender equity debate, may ironically be the revenue generating answer" (p. 258).

Henderson (1995) also identified football as a key to achieving gender equity. Henderson identified numerous areas where major college football programs could reduce operating costs in an attempt to provide additional funds with which to achieve gender equity. The Division I football reform presented by Henderson included reduction of scholarships and roster sizes as well as revenue sharing from conference championships and national playoffs.

Petriella (1994) stated that there are numerous avenues to achieving gender equity without creating a "power struggle" (p. 629) with revenue-producing sports such as football. Petriella noted that institutions utilize various methods "to comply with Title IX including committing one percent of a state university's tuition revenues to achieve equality for women in sports" (p. 629). She also stated that the most successful approach appears to be in increasing marketing and exposure tactics for women's programs. This approach, Petriella argued, is especially important at a national level to attract sponsorship and television revenues.

Judge et al. (1995) presented a more pragmatic discussion on compliance. The authors outlined a series of 13 "compliance tips" (p. 336) which, if followed, would "place the university in a defensible position for a potential Title IX claim" (p. 336). The tips focused mainly on centralization of compliance responsibility within an athletic department, open channels of communication, and constant review and assessment of program

compliance. As part of the compliance process, Judge et al. recommended that an institution survey its students of the underrepresented sex to determine their interests and abilities and then develop a comprehensive plan to accommodate them. Most importantly, Judge et al. encouraged institutions to focus immediately on making programmatic changes to align themselves with Title IX directives. This, Judge et al. contended, is because of the increased possibility of litigation and the fact that making programmatic changes after litigation has begun has proven "to be too little too late" (p. 337).

Although individual institutions have faced administrative and judicial sanctions for non-compliance alone, Henderson (1995) presented an impassioned plea for all segments of our society to "work together to ensure that equitable opportunities are made available to women in athletics" (p. 163). A step in that direction was made in 1992 when the Big Ten Conference became the first conference to adopt gender equity guidelines (Henderson; Wilde, 1994a, 1994b).

The Big Ten Conference issued a Gender Equity Action Policy (1992) committing members to a 60:40 male-female participation ratio by June 30, 1997. The action policy stated that this will be accomplished "through the implementation of positively directed, good faith efforts to promote female student-athletics" (p. 1). Although Henderson (1995) noted that the Big Ten plan does not meet federal guidelines of a 50:50 ratio, she stated the

"plan's proponents believe a compromise is better than no forward movement toward equity" (p. 152).

### Contract Law

Contract law has been identified as one of the most critical areas of law with which an athletic administrator must be aware (Lea & Loughman, 1993; Wong, 1994). In the results of a survey of college and university athletic administrators, Lea and Loughman reported that "execution of contracts" (p. 50) was the most frequently cited of the "top areas requiring legal advice" (p. 50) by Division I athletic departments. Wong stated that "contract law forms the basis of the daily activities of an athletic organization" (p. 64). Because of this, Wong argued that athletic administrators who do not have a working knowledge of contract law or who do not pay particular attention to the contracts into which they enter "can anticipate potentially disastrous results" (p. 64).

Wong (1994) characterized a contract as simply "an agreement between parties which is enforceable under the law" (p. 64). Contracts have been oral or written, but have all contained a promise or set of promises "to do or not to do a particular thing" (Black, 1991, p. 224). The elements essential to the formation of a contract are listed by Wong as "offer, acceptance, consideration, legality, and capacity" (p. 65).

Black (1991) described an offer as a conditional proposal to do or to refrain from doing a specified act, or to pay a particular amount for

something. Wong (1994) emphasized that an offer is conditional because it is non-binding "unless the offeree responds to the offer in the proper fashion" (p. 65). Wong stated that an offer is usually explicit with regard to the subject matter, time and place in which the contract will be performed, the parties involved, and the compensation.

An acceptance, which Wong (1994) stated "can only be made by the party to whom the offer was made" (p. 67), has been accomplished when the offeree receives something with the "intent to retain" (Black, 1991, p. 7). Wong stated that an acceptance can be implied by no response or, as Champion (1993) stated, by any expression stating the "willingness to be bound by the offer's exact terms" (p. 2). For this reason, Wong suggested that athletic administrators always respond, whether negatively or positively, to any offer received.

Consideration has been characterized as the inducement, motive, exchange of value, or impelling influence involved in a contract (Black, 1991; Wong, 1994). There are three legal concepts that have been tied to consideration. First, Wong stated that the doctrine of mutuality of obligation requires that equal consideration be given to both parties of a contract. Next, the preexisting duty rule was described by Wong as a rule which prevents "duties imposed by law or by prior contract" (p. 69) from serving as consideration. The third doctrine tied to consideration was the doctrine of promissory estoppel (Wong). Wong described this doctrine as one which

allows enforcement of a contract without adequate consideration if the contract induced "forbearance or reliance on the part of the promisee" (p. 70).

The legality of a contract has traditionally been a vital element of contract law. Wong (1994) stated that the courts will generally not enforce an illegal contract. This has been, according to Wong, the accepted practice in hopes of discouraging behavior which is unlawful as well as that which violates public policy.

Legal capacity has been defined as the legal age and mental ability necessary to understand the impact of one's actions (Black, 1991; Wong, 1994). Contracts entered into by one who is a minor, mentally incompetent, or intoxicated have been considered voidable (Wong).

Corporate capacity is the term which has referred to the capacity or authority of an individual to enter into a binding agreement on behalf of an institution, organization, or corporation (Wong, 1994). Wong stated that athletic directors often possess the corporate capacity to bind the athletic department or institution to certain agreements.

Once all elements of a contract have been established, failure by either party to perform a duty specified in the contract constitutes a breach (Wong, 1994). A breach of contract was defined by Black (1991) as a "failure, without legal excuse, to perform any promise which forms the

whole or part of a contract" (p. 130). Wong stated that a total or partial breach allows the aggrieved party to file suit.

There are numerous defenses defendants have employed when charged with breach of contract. Wong (1994) listed the impossibility of performance as one defense. This defense has been used when circumstances have evolved as to make it impossible for one party to perform his or her promises as stated in the contract (Wong). Another defense cited by Wong was the frustration of purpose. This defense has been found valid when the value of the consideration in a contract has become "useless to a party because of an *unforeseen* change in circumstances" (Wong, p. 76). Closely related to this defense has been the theory of impracticability (Wong). According to Wong, impracticability has occurred when the cost of adherence to a contract has "greatly increased as the result of an unforeseen occurrence" (p. 76).

Champion (1993) added the defenses of unclean hands, unconscionability, and mutuality to those listed above. Champion stated that a court will not grant a plaintiff relief if that plaintiff "comes to court with unclean hands" (p. 12). In other words, courts have not ruled in favor of a party who had originally negotiated the contract in question in bad faith. The theories of unconscionability and mutuality have referred to the legality of the contract's execution itself. Unconscionability has been used as a defense if the original contract was of an illegal nature. Mutuality, when used



as a defense for breach of contract, has rested on the claim that equal consideration was not given to both parties (Champion).

Wong (1988c, 1994) stated that athletic administrators routinely enter into contracts of all types in the course of managing their organizations. Wong suggested that all new contracts be reviewed by an attorney and all standard form contracts be reviewed annually at a minimum to ensure they can withstand legal scrutiny. When drafting contracts, Wong urged administrators to work closely with legal counsel and provide detailed inputs which enable counsel to develop an effective contract. Wong provided a detailed checklist (1994) as well as a quick-reference checklist (1988c) for athletic administrators to follow when providing information to an attorney drafting contracts for their organization.

Kaplin (1985) maintained that meticulous planning and unambiguous drafting of contracts can allow an organization to avert many of the contract disputes which have disrupted organizations. Termination and nonrenewal of employee contracts are actions which have led to a considerable amount of these legal disputes.

#### Termination/Nonrenewal

Fritz (1989) contended that, beginning with the inception of American higher education at Harvard in 1636 and continuing into the post World War II period when G. I. Bill veterans flooded institutions, courts viewed employment in higher education as a privilege, not a right. Therefore, what

limited contract litigation that arose was consistently resolved in favor of the institution (Fritz).

With the diversification of institutional objectives after World War II and the increased emphasis on civil rights and social issues, faculty members began to demand more from their institutions as employers (Fritz, 1989). This development, together with increased pressure from union initiatives and a declining number of faculty positions are factors which, according to Fritz, have led to increased employment litigation by higher education employees.

Hustoles (1984) stated that a basic tenet of American jurisprudence has been that "an employer could terminate an employee for a good reason, a bad reason, or for no reason at all" (p. 479) given that such termination was not prohibited by statute. Hustoles argued that this "employment-at-will doctrine" (p. 480), established by the United States Supreme Court in Adair v. United States (1908), has been eroded by judicial decisions in favor of plaintiffs.

Hustoles (1984) specifically highlighted cases filed against colleges and universities in which the employment-at-will doctrine has been challenged. Hustoles claimed that plaintiffs in these cases have assaulted traditional employment-at-will principles through "three contract theory categories: (1) verbal assurances, promises, or statements; (2) written policy statements; and (3) employer custom or practices" (p. 480). Hustoles stated that

plaintiffs have cited these three categories as having advanced the premise of an "enforceable contractual expectation" (p. 485).

Because of this wide range of contract theories used by plaintiffs and the corresponding increase in wrongful discharge suits, several authors have made recommendations to higher education administrators regarding employee contract termination and nonrenewal (Fritz, 1989; Kaplin, 1985; Wong, 1988b). Kaplin recommended that institutions define the criteria for dismissal of employees based on the causes of insubordination, incompetency, neglect of duty, and immorality. Kaplin added that these criteria should be in writing and communicated clearly to employees. Fritz suggested that administrators implement thorough evaluation and review procedures, providing accurate documentation which can be accessed during termination proceedings. Wong warned of the possibility of a defamation suit against an institution after announcing the firing of a coach. Because of this, Wong added that the institution should be particularly careful when "disclosing the reasons for the firing" (p. 22).

Non-tenured employees. Baley and Matthews (1989) stated that non-tenured positions are generally "viewed as a probation period of employment" (p. 153) and carry few legal rights. Baley and Matthews then stated that employers are not required to give any reason for non-renewal of a non-tenured employee contract. Fritz (1989) agreed, adding that doing so only leads to greater conflict. Fritz continued by stating that due process

requirements are satisfied by "adequate and reasonable notice of nonreappointment" (p. 114). Full procedural due process has only been required when both parties "shared an expectancy of future employment" (Baley & Matthews, p. 153) or when dismissal procedures have been "conducted in a manner that might damage the reputation or career of the individual" (Baley & Matthews, p. 159).

Much of an athletic department's personnel fall into the non-tenured employee category. Courts have ruled that the expressed purposes of tenure are not usually served when awarded to administrators such as athletic directors (Baley & Matthews, 1989). Therefore, Baley and Matthews asserted that athletic directors "are subject to arbitrary dismissal, transfer and pay cuts" (p. 158). For coaches to be eligible for tenure, Baley and Matthews suggested that their contracts identify their position as that of teacher/coach.

Stoner and Nogay (1989) argued that most NCAA Division I coaches do not want to be placed on a tenure track. Stoner and Nogay cited the lower compensation of tenured professors, the fact that coaches are not usually classroom instructors, and the "lifetime commitment to a single institution" (p. 46) as deterrents to coaches actively pursuing tenure. The dichotomous relationship between tenure and compensation was apparent in a comment made by former University of Kansas basketball coach Larry Brown when reacting to the NCAA disclosure clause which requires coaches to report all

athletically-related income. Brown stated, "I'll accept them limiting what I earn if they will grant me tenure" (Greenberg, 1991, p. 263).

One recent case, Hill v. Board of Trustees of the California State University System (1987), illustrated the plight of a non-tenured athletic department employee. Hill, the athletic director at San Diego State University, was the first female athletic director of an NCAA Division I program. When Hill was discharged after about 20 months as the athletic director, she brought suit against the university seeking reinstatement and back pay. Wong (1988a) stated that because Hill's contract did not imply the position to be permanent, the court ruled that Hill served at the pleasure of the university president and could be terminated without procedural due process.

Baley and Matthews (1989) submitted that even tenured employees can be terminated for adequate cause. Adequate cause has included "professional incompetence, moral turpitude, bona fide financial exigency, and discontinuance of a program or course of study" (Baley & Matthews, p. 154).

#### Coaches' Contracts

Coaches have been the one classification of intercollegiate athletic department employees for which contractual disputes have been common (Graves, 1986). Therefore, this sub-section of the literature review addressed contractual dealings with coaches specifically.

There has been great concern on the part of university counsel when drafting contracts for their coaches. Graves (1986) maintained that this concern springs from the fact that traditional contract law provides no guidance and that there is not ample precedent on which to rely.

Greenberg (1991, 1992), a bold and, by his own admission, notorious sports attorney who specializes in representing coaches, has written extensively about college coaching contracts. Greenberg's articles were written from the perspective of an attorney who represents coaches and therefore provide great insight into what is desirable in a coach's contract. Greenberg (1992) outlined the three components which comprise a college coach's compensation package as (a) university pay or salary; (b) outside income, such as camps, endorsements, and television and radio shows; and (c) perquisites, or additional benefits derived by virtue of being the coach. Greenberg (1992) argued that coaches and administrators can ill afford to be concerned only with salary as 50-80% of a highly paid coach's compensation package comes from outside sources.

Greenberg noted that these outside sources have become a point of contention as some institutions have taken full control of negotiating their coaches' outside income arrangements. At the very least, coaches have been required by the NCAA constitution to report all athletically-related income earned through outside sources to their university's president (Greenberg, 1991; Stoner & Nogay, 1989). Greenberg argued that this was

made necessary to "maintain university control over intercollegiate athletic programs" (p. 262).

Stoner and Nogay (1989) outlined highlights of the "Model Coaching Contract" (p. 43) which they developed. Some of the essential elements which they outlined included, (a) involving a knowledgeable attorney from the inception of the contract process, (b) stating the exact compensation the university will be responsible for if the contract is terminated, (c) retaining the option to reassign the coach within the university and negating his or her exclusive right to the head coach position, (d) including a covenant not to compete, (e) avoiding rollover clauses, and (f) including a buy-out clause that is equal for both parties.

Greenberg (1992) listed several clauses in a coach's contract which merit great consideration. The clause which states the term of employment has always been an area of intense interest. Greenberg stated that the term of most recent contracts are three to five years with various renewal or rollover options. The reassignment clause, which allows coaches to be reassigned to duties other than coaching, has also become popular. Greenberg cited examples of reassignments within university athletic departments to demonstrate the trivial and meaningless nature of many of these positions.

Greenberg (1991) stated that compensation clauses should include a guaranteed base salary, a specific list of fringe benefits, and a relocation

expense allowance. Bonus and annuity clauses were also listed by Greenberg (1992) as innovative and increasingly popular additions to traditional compensation packages.

Finally, Greenberg (1992) argued that drafting the termination clause is "as important as putting together the package" (p. 107) itself. Elaborating on this argument, Greenberg stated, "The first day on the job must be spent planning for the last day on the job, which I guarantee will someday arrive" (p. 103). Therefore, clear definitions for such things as termination for just cause, moral turpitude, termination without cause, and termination pay and benefits are just a few of the elements Greenberg identified as necessary in the termination clause. After all, according to Greenberg, "coaching is a job where you are hired to be fired" (p. 103).

Perquisites. An interesting aspect of college coaching contracts that was repeatedly discussed in the literature was perquisites. Perquisites have consisted of such additional benefits as housing, cars, and country club memberships (Greenberg, 1992). Wong (1988b) maintained that because of the increased control and knowledge institutions now have over coaches' perquisites, they may be subject to even more liability for these perquisites when coaches are terminated.

A landmark decision involving a university's liability for a terminated coach's perquisites completely revised the way in which college and university administrators approach coaching contracts (Stoner & Nogay, 1989).



In Rodgers v. Georgia Tech Athletic Association (1983), the Georgia Court of Appeals ruled that Georgia Tech head football coach Franklin "Pepper" Rodgers was entitled to some of the perquisites he had received before being terminated as head coach with two years remaining on his contract (Graves, 1986). Although Rodgers was retained as an association employee, the court ruled that both parties had originally intended for Rodgers to receive certain perquisites based on his position as football coach which would differ from those common to all association employees (Walker, 1993). This decision was based on the belief that an ambiguous contract should be interpreted in such a way that is least favorable to the author--in this case, the athletic association (Johnson, 1985; McFadden, 1989/1990; Walker, 1993).

Traditionally, employers' liability for breach of contract had been limited to only the amount of direct compensation which would have been paid under the full term of the contract (Graves, 1986). The Rodgers case changed this interpretation. For the first time, the complex nature of a college coach's contract, as well as the elaborate compensation package were taken into consideration (Graves). The loss of the position of head coach was actually construed to be a separate breach and constituted a "compensable loss over and above the paid compensation to which the employee is clearly entitled under the contract" (Graves, p. 556).

Stoner and Nogay (1989) contended that the Rodgers decision acted as a catalyst, prompting universities to pay particular attention to how coaches' contracts are drafted. Stoner and Nogay further stated, "This new attention by university counsel already has had a positive impact upon the stability of programs for student-athletes, even at the highest level" (p. 43).

Breach of contract by coaches. Several authors (Selvaggi, 1993; Stoner & Nogay, 1989) noted that college coaches' contracts are unique in that they contain clauses requiring coaches to comply with all NCAA regulations if the institution of employment is an NCAA member. Therefore, Selvaggi argued that an NCAA violation by a coach "constitutes a breach of contract" (p. 226). Selvaggi contended that if schools pursued legal remedies against coaches who violated NCAA rules, it would compel coaches to comply with NCAA directives. Selvaggi added that coaches would necessarily comply because it would "be too expensive for them not to" (p. 235).

Graves (1986) and Wong (1988b) argued that it is uncommon for a university to sue one of its coaches for any type of breach of contract. The bad publicity it generates, the complications created in attracting a qualified replacement, and the difficulty in demonstrating monetary damages caused by the breach are a few of the reasons cited by Wong.

Selvaggi (1993) emphatically disagreed with those who contend that proving damages is difficult for a university. Selvaggi stated that "the feared dilemma in proving damages is more imagined than real and can

certainly be overcome with competent proofs" (p. 227). He continued, stating "no reason exists to doubt a college's ability to sue a coach for breaching his or her contractual agreement" (p. 227).

Selvaggi (1993) enumerated some of the damages a university could cite which were caused by a coach's NCAA violations. These damages included loss of television revenues, loss of gate receipts, and loss of post-season play opportunities. Selvaggi also argued that institutions could sue coaches for reliance damages. According to Selvaggi, these damages are compensation for financial expenditures in preparation for events which relied on the coach fulfilling his or her contractual obligations. Lastly, Selvaggi argued that an institution could sue a coach who violated NCAA regulations for nominal damages just to prove a point and set a precedent.

Graves (1986) did not feel that an institution possessed the leverage described by Selvaggi (1993). Graves repeatedly claimed an inequity between the coach and the institution when one breaches a contract. At one point, Graves summarized this opinion stating, "the victimized institution has few viable remedies, while the victimized employee has a clear and adequate remedy in the form of full monetary compensation for all lost earnings" (p. 550).

Greenberg (1991) argued that most institutions, with the exception of Washington State, have allowed coaches who have breached their contract "to leave gracefully without further legal recourse" (p. 277). Washington

State forced a settlement with two successive football coaches who moved on to different universities before their contracts had expired (Greenberg).

There was, however, a well known case in 1990 when a university was granted permission by its board of governors to file suit against one of its coaches (Selvaggi, 1993). Selvaggi maintained that when North Carolina State threatened legal action against basketball coach Jim Valvano for breach of contract, it was the first time a university had done so. North Carolina State argued that Valvano breached his contract by "failing to ensure the academic progress of his student-athletes, a responsibility clearly detailed in Valvano's contract with the school" (Selvaggi, p. 221). The proceedings were settled out of court and Valvano subsequently resigned (Greenberg, 1991; Selvaggi).

#### Contractual Relationships with Student-Athletes

Athletic departments have also faced contractual disputes with student-athletes for whom they have provided scholarships. The contractual obligation an institution and its athletic department owes its student-athletes has been the subject of great debate (T. Davis, 1991).

Several authors (Appenzeller & Appenzeller, 1980; R. N. Davis, 1991; T. Davis, 1991; Johnson, 1985; Mairo, 1993; Porto, 1985; Stotlar, 1985) have agreed that a contractual relationship may be established by an athletic scholarship. Many have maintained that an athletic scholarship contains the elements of an offer, acceptance, and consideration which are required of a

valid contract (R. N. Davis; Johnson; Mairo; Stotlar). Mairo added that courts have found athletic scholarships to be contractual in nature because they "impose obligations upon student-athletes and the institutions which confer the awards" (p. 158).

While R. N. Davis (1991) and Mairo (1993) conceded that not all courts have been in agreement in recognizing an athletic scholarship as a contract, they both stated that clearly the trend is to recognize it as a contract. Two significant cases were identified as establishing this trend. R. N. Davis argued the seminal case in establishing the contractual relationship of an athletic scholarship was Taylor v. Wake Forest University (1972). The Taylor court ruled that a student-athlete had a contractual obligation to attend and participate in practices as well as maintain academic eligibility in order to maintain one's scholarship (R. N. Davis; Johnson, 1985; Kaplin, 1985; Stotlar, 1985). R. N. Davis stated, "In Taylor, the North Carolina Court of Appeals stripped the student-athlete/institution relationship to its bare essentials and characterized it as a contract" (p. 175). In Begley v. Corporation of Mercer University (1979), the court held that an institution is not bound by its contractual relationship to honor a student-athlete's scholarship if the athlete becomes academically ineligible or ineligible due to NCAA regulation violations. These violations were recognized as a violation of the terms of the contract (Mairo; Stotlar). Stotlar called the Begley

decision "the most rigid interpretation of the scholarship-as-a-contract concept" (p. 132).

Right to participate. Although athletic scholarships are now generally recognized as contracts, they have not, however, consistently been interpreted by the courts as providing student-athletes with the right to participate. This is because participation has not been clearly established as a property right (Mairo, 1993; Stotlar, 1985). While eligibility has been established as a constitutionally protected property right in a few cases, disciplinary actions as well as academic ineligibility have been successfully cited as reasons to restrict an athlete's participation (Mairo; Porto, 1985).

Mairo (1993) argued that the strict interpretation of an athletic scholarship's wording, which creates a contractual obligation on the part of the institution to provide scholarship funds but not playing time, is flawed because it ignores the reasonable expectation doctrine. Mairo contended that contract law holds one party responsible for consideration which the other party can reasonably expect. These expectations could have been based upon oral or written communications prior to the agreement. Mairo maintained that a reasonable expectation of a student-athlete on an athletic scholarship is not only financial support, but an opportunity to participate as well. Mairo further argued that courts have erred in not applying the reasonable expectation doctrine to athletic scholarship cases because it has

been applied to other types of contractual disputes between students and institutions of higher education.

Mairo (1993) concluded that "a student-athlete's eligibility interest rises to the level of a constitutionally protected property right which is derived from the athletic scholarship" (p. 170). Therefore, Mairo argued that courts should prevent institutions from revoking student-athletes' eligibility without first providing them procedural due process as guaranteed in the Fourteenth Amendment. Porto (1985) stated that although the courts have not reached a consensus on this matter, it "has opened a Pandora's box of vexing issues" (p. 146).

The issue of eligibility will, in all likelihood, be addressed in continued litigation, but Porto (1985) encouraged institutions themselves to take the lead. Porto argued that institutions could abandon the concept of the "student-athlete" by allowing athletes to participate regardless of academic standing. This, Porto stated, would amount to an admission that a major role of our universities is to train professional athletes. Porto maintained that this admission, "if and when it comes, should be made by educational, not judicial, policymakers" (p. 153).

Employer/employee relationship. While an athletic scholarship has clearly established a contractual relationship between a student-athlete and an institution, it has not necessarily established an employer/employee relationship. Stotlar (1985) maintained that the courts have not clearly

defined this relationship. In some instances, the courts have ruled that "although the athletic scholarship is based on athletic ability and the promise to participate, the purpose of the funds is to defray educational expenses, not for playing a specified sport" (Stotlar, p. 137). Stotlar also noted, however, that courts have construed "athletically related financial aid" (p. 138) as a possible indicator of an employer/employee relationship. Stotlar further stated that, at times, the NCAA has clearly classified the student-athlete as equivalent to other members of the student body, thereby eliminating the possibility of treating the student-athlete as an employee of the institution.

R. N. Davis (1991) strongly asserted that the contractual relationship between an athlete and an institution clearly establishes the athlete as an employee of the institution. R. N. Davis cited the business and entertainment aspects of collegiate athletics, the fact that money paid to student-athletes for room and board is taxable income, as well as the lack of academic integrity demonstrated by many institutions in relation to their student-athletes as evidence of employment.

The ambiguous employment relationship between a student-athlete and his or her institution has raised numerous questions concerning pay, tax liability, workers' compensation, and amateur status. Some of these issues have been addressed through litigation, but with little consensus (R. N.



Davis, 1992; Stotlar, 1985). A few workers' compensation cases have been highlighted to illustrate the disparity in rulings on this matter.

In Van Horn v. Industrial Accident Commission (1963), the court ruled that Van Horn, a football player at California State Polytechnic College, was acting as an employee of the college when he was killed in a plane crash returning from a football game in Ohio. His wife and minor children were therefore granted death benefits under the California workers' compensation statutes. The court found that Van Horn's scholarship was, in fact, payment for athletic participation and was not even required to be used to defray his educational expenses. These payments in return for services constituted an employment arrangement. The court did, however, note that not all scholarship athletes would necessarily be considered employees of their institutions (Duffala, 1987; Stotlar, 1985).

The ruling on Rensing v. Indiana State University Board of Trustees (1983) hinged on different rationale. Stotlar (1985) stated that "the primary basis for finding was an examination of 'intent'" (p. 134). Rensing was a football player who sustained a serious neck injury while covering a punt, rendering him a quadriplegic (Stotlar). He sought recovery for damages under workers' compensation statutes and was denied benefits by the Indiana Supreme Court. The court determined "that it was not the intent" (Stotlar, p. 134) of Rensing nor Indiana State University for their financial aid agreement to constitute an employment contract. If employment had

been the intent, it would have been a violation of NCAA regulations. The court therefore ruled that without the intent of either party to enter into an employment contract, a contract and subsequent employment cannot exist. (Duffala, 1987; Stotlar).

Five months after the Rensing decision, a Michigan court ruled similarly in Coleman v. Western Michigan University (1983). Coleman was a football player whose scholarship reduction after an injury forced him to resign from school because he could no longer afford tuition. After applying for workers' compensation benefits, the Court of Appeals of Michigan denied his request by applying the "economic reality test" (R. N. Davis, 1991, p. 184; Duffala, 1987, p. 1265) to determine if an employment relationship existed. The court concluded that, although his scholarship was wages, he was not paid strictly to play football (R. N. Davis; Duffala). Rather, "playing football was a means of financing" (R. N. Davis, p. 184) his education.

As the employer/employee relationship of student-athletes and institutions has been and will continue to be debated, one state took decisive action to clarify the issue. California legislatively defined the student-athlete/institution contractual relationship as not being that of an employer/employee. In response to earlier workers' compensation cases involving collegiate athletes, the California Legislature amended the state's workers' compensation statute in 1965 and again in 1981. The

amendments clearly excluded scholarship student-athletes from gaining employee status (R. N. Davis, 1991).

The California statutory exclusion was upheld in Graczyk v. Workers' Compensation Appeals Board (1986) when the court ruled "that a student athlete was not an employee of the state university that he was attending when he allegedly sustained injuries while playing football for the university" (Duffala, 1987, p. 1263). In a similar case a California Court of Appeals ruled that neither the state nor a state university can be held vicariously liable for tortious actions of a student-athlete during a competition. This was because the court determined that the student-athlete was not an employee of the state or the university (Townsend v. State of California, 1987).

R. N. Davis (1991) expressed his dismay at the "judicial inconsistency" (p. 192) with which the issue of the contractual relationship between a student-athlete and an institution has been dealt. Davis argued that this inconsistency will not be eliminated until academic institutions adequately address the conflict between the academic and athletic missions in higher education. This conflict, Davis argued, can best be resolved by recognizing student-athletes as employees and according them the appropriate privileges or by simply de-emphasizing collegiate athletics. R. N. Davis went on to note that the current trend toward not recognizing student-athletes as employees is based "on a simplistic and idealistic perception of

intercollegiate athletics, a perception that is far removed from the realities of intercollegiate athletics today" (p. 185).

Educational malpractice/exploitation. An institution's failure to provide its student-athletes with an opportunity to receive a genuine education has also led to legal conflict between student-athletes and their institutions. Courts have traditionally followed the doctrine of academic abstention, or a reluctance to interfere with the educational process (T. Davis, 1992b; Huelbig, 1991; Johnson, 1985). Following this doctrine, courts have deferred internal educational policy decisions to educators and administrators (H. Appenzeller, 1985b; Johnson). Johnson and Huelbig cited a trend, however, in which "courts have shown an increased willingness to review decisions" (Johnson, p. 101) of university administrators which are not purely academic in nature. This trend, Johnson argued, is important in establishing a student-athlete's right to hold an institution accountable for failing to fulfill its educational obligation. The resulting increase in educational institutions' accountability to students has led to an increase in educational malpractice and exploitation litigation which H. Appenzeller described as "an ever increasing threat to the education profession" (p. 123).

Educational malpractice is a tort from which students have sought relief for professional misconduct resulting in inadequate educational services, benefits, or opportunities (T. Davis, 1992a; Greenberg, 1990; Rafferty, 1993). H. Appenzeller (1985b) stated that educational malpractice became

an issue in the 1950s and "is now a powerful factor in today's education profession" (p. 120). Educational exploitation is closely related to educational malpractice although it has been raised mainly by student-athletes who have believed that "they have been deprived of an education while being exploited for their athletic ability" (Huelbig, 1991, p. 291).

Several authors (R. N. Davis, 1991; T. Davis, 1992a, 1992b; Rafferty, 1993) stated that it has been difficult for student-athletes to claim damages for educational malpractice or educational exploitation under tort law. This is primarily because of what one court called the "intensely collaborative process" (R. N. Davis, p. 191; Huelbig, 1991, p. 301) of education which makes it very difficult to establish proximate cause (R. N. Davis; T. Davis; Rafferty). Various public policy considerations, ranging from the lack of a defined standard of care to the reluctance to encourage increased litigation against educational institutions, have also led courts to dismiss tortious educational malpractice claims (T. Davis; Rafferty). T. Davis (1992a) argued that courts have erred in summarily dismissing tortious educational malpractice claims. T. Davis contended that student-athletes have a cause of action and, because of the special nature of the student-athlete/university relationship, imposing a tort duty of care on universities for an athlete's academic well-being is within recognized tort doctrine.

The reason educational malpractice and exploitation have been included in this discussion of contract law is the fact that a scholarship can be

interpreted as creating a "contractual obligation to educate" (Johnson, 1985, p. 103). Several authors (T. Davis, 1991; Huelbig, 1991; Johnson) argued that exploiting an athlete for his or her athletic services without providing a meaningful education in return may be construed as a breach of that contract. Elaborating on this point, T. Davis maintained that the contractual agreement an institution makes with a student-athlete imposes an obligation on that institution to provide an educational opportunity to that student-athlete. Citing the good faith doctrine, T. Davis stated that there is an implicit, if not fully articulated, educational duty placed upon an institution when a student-athlete provides his or her athletic services in exchange for a scholarship.

Johnson (1985) also stated that an institution's obligation to educate is implicit and central in an athletic scholarship agreement. Because of the unequal bargaining positions between an institution and a student-athlete, and the reluctance of the courts to intervene, Johnson argued that the application of contract law is the most effective way for student-athletes to address educational grievances with an institution. This, Johnson contended, prevents institutions from undercutting "the concept of amateurism" (p. 113) by exploiting an athlete's services without providing some degree of academic training. Johnson continued by stating, "Where no educational obligation is read into an agreement, little distinguishes the payment of money for athletic services by a university from payment by a professional

team" (p. 114). Without this educational obligation, Johnson stated that public policy is not served as academic institutions deceive the public as to their basic purpose.

R. N. Davis (1991) cited Ross v. Creighton University (1990, 1992) as a case which established contract law as an effective remedy to educational malpractice and exploitation. In Ross, the court ruled that an athletic scholarship is an enforceable contract and an institution could be held responsible for any educational promises made within the agreement (R. N. Davis; Rafferty, 1993). Because the issue in Ross was the quality of education and the trial court ruled that an education's quality cannot be quantified in a contract, a breach of contract was not demonstrated (T. Davis, 1992b; Huelbig, 1991; Rafferty, 1993; Wong & Barr, 1990). Upon appeal, however, Ross was allowed to proceed with his claim when the Seventh Circuit Court ruled that, on remand, a district court could determine if Ross received the opportunity for a meaningful education without having to evaluate the quality of his education (T. Davis; Rafferty). Both T. Davis and Rafferty stated that the Seventh Circuit Court's ruling was inconsistent with existing precedent regarding judicial scrutiny of an educational institution's conduct.

This case's significance, however, lies in the fact that it established specific educational agreements made in athletic scholarships as legally binding. The Ross Court also recognized a right of action for

student-athletes to pursue a claim against an institution if it breaches specific promises made in an agreement (T. Davis, 1992b; Rafferty, 1993).

Johnson (1985) conceded that students seeking redress for educational exploitation under contract law will not necessarily have "an easy case to prove" (p. 121). Johnson cited burdensome evidentiary hurdles as well as the fact that courts will likely require the student-athlete to demonstrate a good faith effort to have attained a meaningful education. This was evident in the Ross decision when the court stated that "ultimately the student is responsible for academic success in college" (Wong & Barr, 1991, p. 18).

Rafferty (1993) contended that alleviating the problem of educational exploitation through litigation may not be the answer as "guidance on the judicial remedy" (p. 187) has yet to be provided. Instead, Rafferty maintained that the adoption of a uniform scholarship agreement which outlines specific educational obligations provides a much more attractive alternative to litigation.

#### Tort Liability

Tort liability is a dynamic legal concept which Enos (1989) stated is neither a crime nor a breach of contract. Prosser (1971) stated, "The purpose of the law of torts is to adjust losses arising out of human activities and to afford compensation of injuries sustained by one person as the result of the conduct of another" (p. 6). Wong (1994) stated that tort law provides injured individuals an avenue through "which they may be



compensated or 'made whole' through the recovery of damages" (p. 348). Rushing (1986/1987) defined tort liability as "an area of law which is concerned with providing relief to persons who have been 'wronged' by someone who was liable for their safety" (p. 58).

The origin of the word tort has also provided insight into its meaning. Black (1991) stated that the word tort is a derivative of the Latin word "torquere" which means twisted, to twist or wrested aside. Tort law was originally derived from English common law which asked two questions: (a) who is at fault, and (b) who must bear the burden of the injury? (Nolte, 1979). Because tort liability is a continually developing legal concept, Enos (1989) argued that it has been difficult to determine a general legal principle upon which it is based. Enos did state, however, that the rationale for tort law is to "discourage anti-social behaviors" (p. 10) that result in injury.

Enos (1989) maintained that, in addition to familiar torts such as libel, slander, assault, and battery, there are many "unnamed" (p. 10) torts as well. These unnamed torts have ranged from the intentional infliction of mental suffering to the denial of the right to vote (Enos). Although tort law can be applicable to a wide range of human behavior, Enos argued that there are some elements common to all applications of tort law. Two of these elements have been "a recognizable need for compensation" (Enos, p. 11) and "the prevention of future wrongs and the punishment of the defendant" (Enos, p. 12). Enos stated that, together with compensating the

plaintiff, it has been held that punishing the wrongdoer will act as a deterrent to similar acts in the future.

Wong (1994) stated that torts are differentiated by the intent of the defendant toward the plaintiff. Wong listed the three levels of intent as: (a) "intentional tort" (p. 349), the defendant intentionally committed the act and intended to harm the plaintiff; (b) "reckless misconduct or gross negligence" (p. 349), the defendant intentionally committed the act but did not intend to harm the plaintiff; and (c) "unintentional tort or negligence" (p. 349), the defendant failed to "exercise reasonable care" (p. 349) but did not intend to commit the act or harm the plaintiff. Wong maintained that intentional and unintentional torts are the most prevalent torts in athletics.

In addition to intentional and unintentional torts as described above, Rushing (1986/1987) and Nolte (1979) added strict liability as a tort classification common in the athletic setting. Nolte described strict liability as a tort which holds manufacturers and suppliers liable for injuries sustained through the use of their product "although not actually at fault" (p. 7). In strict liability cases, the burden of proof has shifted to the defendant to show that the product was not being used in its intended fashion at the time of the injury. The plaintiff has only needed to demonstrate that the product was used as intended and that its design or manufacture defect or flaw was the proximate cause of the injury (Nolte).

Several authors (Champion, 1993; Enos, 1989; Nygaard & Boone, 1985; Weistart & Lowell, 1979) were even more specific in arguing that the unintentional tort of negligence is the most common tort in an athletic setting. Therefore, the tort of negligence was the focus of much of the remainder of the literature review.

### Negligence

Negligence began developing as an independent tort in the early 1800s. Individuals performing services in various "public callings" (Enos, 1989, p. 12), such as surgeons and blacksmiths, began to be held responsible when their actions resulted in injuries. The industrial revolution also acted as a catalyst for the expanded recognition of negligence as a tort. The increase in industrial machinery and the growth of the railroad industry led to numerous injuries and a heightened interest in negligence litigation as a remedy. Initially, courts only dealt with the most serious acts, and only those of commission, not omission. Over time, however, courts began to realize that, at times, a certain obligation for one to act exists. This led to litigation aimed at one's failure to act, as well as that aimed at inappropriate behavior (Enos).

Today, the tort of negligence has been defined as "the failure to use such care as the reasonably prudent and careful person would use under similar circumstances" (Black, 1991, p. 716). Black stated that the doctrine of negligence "is founded on reasonable conduct or reasonable care under

all circumstances" (p. 716). Unlike willful or wanton acts, negligence has been characterized by "inadvertence, thoughtlessness, inattention, and the like" (Black, p. 716). Nolte (1979) emphasized this point, arguing the issue regarding negligence is not whether the defendant acted in a malicious or antagonistic manner, but rather, if the defendant acted as a reasonable and prudent person would have under similar circumstances.

Enos (1989) stated that the standard of reasonable conduct is a "community standard" (p. 18) which may be established by "statutes, administrative rules or regulations, or by judicial decisions known collectively as the common law" (Gaskin, 1986/1987, p. 21). This "reasonable man doctrine" (Black, 1991, p. 875) also has an associated professional standard of care. Wong (1994) stated that a defendant with superior skill or knowledge will be held to a higher standard of care which is commensurate with that of others who possess similar skill and/or knowledge.

The standard of care required of a defendant may also be affected by the ages of the involved parties and the gravity of the situation. Courts have consistently ruled that the standard of care owed elementary and secondary school students is greater than that owed college students (McFadden, 1989/1990). On the contrary, a lesser standard of care has usually been required of defendants who had acted in an emergency situation with little or no time to reflect on the proper course of action (Enos, 1989).

In athletic settings, a customary standard of care has often been cited by defendants. Enos (1989) argued that this practice has not always been effective. The simple fact that an industry has traditionally acted in accordance with a certain standard of conduct has not prevented courts from ruling that conduct to be unreasonably dangerous or negligent (Enos).

Four elements must be present in a particular situation and demonstrated by the plaintiff for negligence to be established (Baley & Matthews, 1989; Champion, 1993; Nygaard & Boone, 1985; Wong, 1994). The four required elements have been identified as (a) duty, (b) breach of duty, (c) proximate cause, and (d) damages (Baley & Matthews, Champion, Wong). Several authors (Champion; Gaskin, 1986/1987; Wong) have highlighted the fact that the burden of proof in negligence actions lies with the plaintiff. The plaintiff has been required to prove all four elements of negligence to recover damages. Defendants must merely prove one element is missing to relieve themselves of liability (Champion; Gaskin).

Duty. A duty has been interpreted as a legal obligation to conform to a certain standard of conduct to protect others from foreseeable risks (Black, 1991; Wong 1994). Nolte (1979) argued that, when applied to an athletic setting, an administrator has a legal duty to protect participants, spectators, and patrons from foreseeable events which could be anticipated by a reasonable person of average intelligence. Some examples of duties owed to others in an athletic setting include (a) proper supervision, (b) adequate

instruction, (c) appropriate equipment, (d) a safe environment, (e) reasonable selection and matching of participants, and (f) proper post-injury procedures (Korpella, 1971c; Nygaard & Boone, 1985).

Korpella (1971c) stated that the duty owed to the plaintiff is often the central issue that arises in athletic tort cases. The issue, argued Korpella, is "whether the question of duty is one of law for the court or a question of fact for the jury" (p. 837). Champion (1993) and Korpella both stated that the actual existence of a legal duty is a question of law, while the extent of that duty rests on the "reasonable foreseeability of injury" (Korpella, p. 837), which is a question of fact.

The above determination has been a crucial factor in tort cases involving athletics. Because the determination of an existence of a duty is one of law, it has therefore been appealable (Korpella, 1971c). This appealable point of law is why, according to Korpella, there have been so many tort claims in athletics that have reached appellate level.

Breach of duty. A breach of duty has been defined as a failure to provide the appropriate standard of care as required by the foreseeable risks (Baley & Matthews, 1989). Black (1991) stated that any failure to abide by one's legal duty, whether through willfulness or simple oversight, is a breach of duty.

Baley and Matthews (1989) stated that acts of commission and acts of omission can result in a breach of duty. Acts of commission have included

misfeasance, the improper performance of a lawful act, and malfeasance, the performance of an act which is beyond one's authority. An act of omission has been nonfeasance, or the failure to perform a required duty (Black, 1991; Wong, 1994).

Proximate cause. Proximate cause has been established when the plaintiff can demonstrate a causal connection between the defendant's conduct and the resulting injury, and that without such conduct the injurious result would not have occurred (Black, 1991; Champion, 1993). Oftentimes the "but for" rule has been applied to determine if a defendant's conduct was the proximate cause of the damage. This rule states that "but for" the defendant's negligent act, the injury in question would not have happened (Gaskin, 1986/1987; Wong, 1994).

Damages. Black (1991) and Wong (1994) stated that damages are pecuniary compensation awarded by the courts to an individual who has suffered harm or injury from the unlawful or negligent act of another. For negligence to be established, the plaintiff has been required to demonstrate that he or she suffered actual loss or damage (Champion, 1993; Wong).

When a plaintiff has successfully demonstrated actual loss or damage as a result of the defendant's conduct, the courts have awarded compensatory and/or punitive damages (Champion, 1993; Wong, 1994). Compensatory damages have been awarded to plaintiffs to compensate them for the actual loss sustained or to restore the plaintiff "to the position he or she was in

prior to the injury" (Black, 1991, p. 270). Wong stated that recovery of compensatory damages may be sought to reimburse for actual losses or harm in four areas: (a) pain and suffering, (b) medical expenses, (c) decrease of earning capacity, and (d) loss of companionship.

Punitive damages have been awarded in addition to compensatory damages for the purpose of punishing the defendant for particularly egregious conduct or for making a public statement with the intent of deterring such behavior in the future (Black, 1991; Wong, 1994). Punitive damages have also been intended to console "the plaintiff for mental anguish, shame, or degradation suffered" (Wong, p. 367).

Nominal damages, which can be awarded in intentional tort actions, cannot be awarded for negligence (Champion, 1993; Wong, 1994). Nominal damages have been a trivial amount awarded to a plaintiff when no actual loss has occurred but an invasion of his or her rights has been demonstrated (Black, 1991; Champion; Wong). Because negligence actions require that actual loss or damage as a result of the defendant's behavior be established, nominal damages have been inappropriate (Champion; Wong).

#### Defenses to Negligence

There have been numerous defenses utilized by defendants when accused of negligence. A few of the most common defenses have included (a) absence of negligence, (b) contributory negligence, (c) comparative negligence, (d) unavoidable accident or Act of God, (e) assumption of risk,



(f) sovereign immunity, and (g) exculpatory agreements (Champion, 1993; Nolte, 1979; Nygaard & Boone, 1985; Rushing, 1986/1987; Wong, 1994).

Absence of negligence. Wong (1994) stated that most defendants will first attempt to prove that their conduct was not negligent. This has been done through either disproving one or more of the required elements of negligence or by demonstrating that the defendant acted as a reasonable and prudent person would have under similar circumstances.

Contributory negligence. Contributory negligence is present if a plaintiff "failed to exercise due care for his or her own safety" (Wong, 1994, p. 373) and this behavior was a proximate cause of the injuries suffered by the plaintiff. In states which recognize contributory negligence as a defense, plaintiffs have been barred from recovery of damages if found to be negligent in any degree (Champion, 1993; Nygaard & Boone, 1985; Wong).

Comparative negligence. Comparative negligence statutes have been adopted by many states to mitigate the harsh effects of a contributory negligence doctrine which precluded recovery when the plaintiff's negligence was slight and the defendant's was gross. Under the doctrine of comparative negligence, guilt of the plaintiff is pro-rated to that of the defendant. Although the actual rules have differed among states, the theory has been that a plaintiff may recover a portion of the damages if found to be proportionally less negligent than the defendant (Champion, 1993; Nolte, 1979; Nygaard & Boone, 1985; Wong, 1994).

Unavoidable accident or Act of God. An unavoidable accident or "Act of God" (Nygaard & Boone, 1985, p. 5) defense has been employed when the injury was the result "of natural consequences, or where no amount of precaution or foresight, except elimination of the activity itself, could have prevented the accident" (Rushing, 1986/1987, p. 63). Nolte (1979) added that this defense is successful only when the accident was unforeseeable and the anticipation of such an event "would amount to clairvoyance" (p. 21).

Assumption of risk. Assumption of risk has been defined as a voluntary exposure "to a known and appreciated danger" (Black, 1991, p. 82). This doctrine has held that an individual who voluntarily exposes oneself to a known danger created by the conduct of another, effectively relieves the other party of any duty to provide a certain standard of care (Champion, 1993; Wong, 1994). In the absence of such a duty, there can be no breach and, therefore, no negligence from which a plaintiff may recover damages (Bradley, 1991; Wong). For assumption of risk to be a viable defense, it has also been necessary to demonstrate that the plaintiff fully appreciated and understood the nature and extent of the risks to which he or she was voluntarily exposed (Black; Champion; Wong).

In an athletic setting, it has been established that individuals assume the risks inherent and foreseeable to a particular sport or activity, but do not assume the risk of injury due to another individual's negligence (Champion,

1993; Korpella, 1971b). Additionally, Gaskin (1986/1987) noted that "neither participants nor spectators assume the risk of defective equipment or dangerous facilities (p. 150).

In an article discussing California's assumption of risk doctrine, Bradley (1991) outlined the debate over the application of various levels of assumption of risk. An unreasonable implied assumption of risk, in which a plaintiff unreasonably encountered a known risk resulting from the defendant's negligence, has been construed as a form of contributory negligence thereby denying recovery to the plaintiff. An express assumption of risk, in which a contractual relationship exists, has clearly served as a complete and valid defense to negligence claims (Bradley; Champion, 1993; Wong, 1994). The debate, according to Bradley, has centered on whether reasonable implied assumption of risk is a valid defense for negligence. Bradley stated that reasonable implied assumption of risk exists "when a plaintiff acts reasonably in encountering a known risk of injury" (p. 477).

Bradley (1991) stated that many courts and legal scholars have questioned the continued use of reasonable implied assumption of risk as a defense in jurisdictions which have enacted comparative negligence statutes. The inconsistency lies in the fact that comparative negligence allows an individual who has acted somewhat unreasonably to recover damages while reasonable implied assumption of risk denies an individual who has acted reasonably any recovery of damages. Champion (1993) and Wong

(1994) stated that many states have, in fact, abolished their implied assumption of risk doctrines. In such states, Wong stated that plaintiffs are entitled to full recovery of damages for injuries if it can be proven that the plaintiff did not knowingly expose him/herself to an unreasonable risk.

Bradley (1991) maintained that reasonable implied assumption of risk should remain as a viable defense to sport-related negligence. Bradley cited several reasons, most significant of which was the fact that sports are "socially desirable and rewarding" (p. 495) and voluntary participation "should not be limited by the threat of litigation" (p. 495). Bradley did, however, argue that when the defendant's negligence created a secondary risk or when the plaintiff was not completely aware of specific dangers involved, the application of reasonable implied assumption of risk should be limited. Bradley also suggested that, under certain circumstances, assumption of risk should be a question of reasonableness to be decided by a jury instead of a matter of law.

Sovereign immunity. Sovereign, or governmental immunity is a judicial doctrine which has prevented the government from being sued without its consent (Black, 1991; Champion, 1993). This doctrine was originally founded on the English principle that "the King can do no wrong" (Black, p. 971; Gaskin, 1986/1987, p. 36). Gaskin stated that Massachusetts was the first state to apply the doctrine of sovereign immunity to a school setting in an 1860 case in which a boy fell into a hole on school grounds.

Gaskin reported that by 1930, 28 states had a doctrine of governmental immunity in place. Over time, however, state governments and courts have made significant progress towards a much more narrow application of sovereign immunity statutes (Black; Champion; Gaskin). Nolte (1979) cited two reasons for the decline of governmental immunity as a viable defense: (a) the availability of low-cost liability insurance, and (b) the theory that a person injured by governmental negligence should not have to bear the burden alone.

Gaskin (1986/1987) argued that cases in athletics are far less likely to enjoy protection under governmental immunity than cases involving physical education classes. Unlike physical education, athletics have not generally been considered governmental functions, or "directly related to the school's purpose . . . or general welfare of the public" (p. 40). Rather, athletics have been defined as proprietary functions, having no "direct relationship to the school's purpose" (p. 40) and therefore less likely to be protected by governmental immunity.

Exculpatory agreements. Exculpatory agreements, commonly referred to as waivers, have been used "to relieve one party of all or part of its responsibility to another" (Nygaard, 1985, p. 34; Nygaard & Boone, 1985, p. 34). Technically, waivers have been defined as "the intentional or voluntary relinquishment of a known right" (Black, 1991, p. 1092). As such, waivers have been considered contracts which effectively negate the negligence

principle of tort law. This relationship has created a significant conflict between contract law, which provides individuals the right to enter into a binding agreement, and tort law, which requires individuals to be held responsible for negligent behavior (Champion, 1993; Nygaard, 1985; Wong, 1994).

Nygaard (1985) stated that the above conflict has been resolved in ways which have led to "confusion regarding the validity of waivers" (p. 34). Although certain waivers have been upheld, Champion (1993) and Nygaard both stated that waivers are not looked upon favorably by the courts and are subject to "a heightened degree of judicial scrutiny" (Nygaard, p. 35) because they may create a dangerous situation where one is relieved of any liability for his or her actions. Although there are many factors which may invalidate an exculpatory agreement, the most commonly cited conditions were when a waiver violated public policy and when there was a clear disparity in bargaining positions between the parties involved (Champion; Nygaard; Wong, 1994).

#### Required Legal Duties

Several authors have identified legal duties which administrators and coaches are required to provide athletes. A few of the most common duties included (a) proper supervision; (b) adequate instruction; (c) appropriate equipment; (d) reasonable screening, selection and matching of participants; and (e) proper first aid, emergency and post-injury procedures (Champion,

1993; Korpella, 1971c; Nygaard & Boone, 1985). Safe and proper facilities have also been required to be provided to athletes as well as spectators (Champion; Gaskin, 1986/1987; Korpella, 1971a; Nolte, 1979).

Proper supervision. H. Appenzeller (1985a) reported that 80% of all sport-related injury litigation claiming negligence "deal[s] with some aspect of supervision" (p. 296). This fact has made supervision of all elements of an athletic program the fundamental legal duty upon which all other duties are based (Horine, 1985; Nygaard & Boone, 1985). Horine argued that it is difficult to discuss supervision as an independent topic because it "permeates most areas of administration" (p. 49). It has, however, been consistently made clear by the courts that a duty of supervision exists for extracurricular activities and that this requires administrators to provide "non-negligent supervision of sports activities" (Korpella, 1971c, p. 852). Nolte (1979) highlighted the importance of proper supervision when he stated that defendants who have written "rules and regulations to gain and maintain control of an activity" (p. 17) and follow a "carefully monitored supervisory schedule" (p. 18) usually survive litigation with much less damage than those who have not taken such precautions.

An administrator's duty to provide proper supervision of an athletic program has entailed supervision of all aspects of the program, to include supervision of personnel (Horine, 1985). Supervision of personnel has become vitally important because, as an administrator, one can be held

vicariously liable for the negligent actions of an employee (K. A. Davis, 1994; Wong, 1994). Nolte (1979) encouraged administrators to ensure that staff members who provide "specific supervision" (Nygaard & Boone, 1985, p. 9) to participants of an activity are "legally qualified and competent" (p. 13). While specific supervision has referred to the "hands-on" supervision of athletes as they participate in an activity (Figone, 1989; Nygaard & Boone, 1985), general supervision has been identified as supervision of "all the areas and activities related to the game or activity" (Nygaard & Boone, p. 9).

The majority of the specific supervision of athletes has fallen squarely on the shoulders of coaches. Figone (1989), therefore, recommended that "the athletic director or administrator in charge of the athletic program should train all coaches to ensure they know their legal duties" (p. 71). Figone suggested that this be done during a yearly in-service workshop to educate coaches on the constantly evolving legal theories which affect them. By conducting this workshop, Figone argued that administrators can "ensure all coaches are well-informed, act as reasonable and prudent professionals, and know how to execute their legal responsibilities" (p. 71).

Adequate instruction. One way administrators and coaches have minimized the risk of potential litigation by athletes has been to ensure that their athletes receive adequate and proper instruction (Champion, 1993). Champion stated that this instruction should be thorough and focus on the sport's



"technical aspects and their corresponding safety rules" (p. 129) as well as "methods to minimize injuries" (p. 122).

The inherent risks associated with a particular activity is another area in which authors recommended that athletes be instructed (Champion, 1993; Figone, 1989; Nygaard & Boone, 1985). Figone suggested that a warning system be implemented which "ensures that athletes understand the risk inherent in specific activities" (p. 72). Nygaard and Boone argued that athletes must achieve "three levels of comprehension--knowing, understanding, and appreciating" (p. 27) before one's duty to adequately warn is fulfilled.

Appropriate equipment. Nolte (1979) stated that anyone who "furnishes, supplies or selects equipment for another owes that other [person] a duty" (p. 14). Nolte added that the supplier will usually be held liable for injuries sustained by the user if one of three conditions exist: (a) the supplier had reason to believe the equipment was dangerous if used as intended, (b) the supplier had reason to believe the user would not realize the associated dangers, or (c) the supplier failed to inform the user of the equipment's condition or dangers associated with its use.

Gaskin (1986/1987) stated that guidance from the courts has indicated that equipment must be available to all participants and must meet "the standards considered usual and customary by the profession" (p. 149). It has also been established that equipment must fit properly, be inspected

regularly, be repaired or replaced immediately when deemed unsafe, and always be used in its intended manner only (Figone, 1989; Gaskin, 1986/1987; Nygaard & Boone, 1985; Wong, 1994).

Reasonable screening, selection, and matching of participants. The duty to screen potential athletes to ensure they are physically and psychologically able to participate has been shared by administrators, coaches, and medical personnel (Figone, 1989). It has been recommended that this screening process include a thorough pre-season physical examination, an evaluation of the athletes' physical condition, and evidence of sufficient rehabilitation of previous injuries (Champion, 1993; Figone, 1989; Nygaard & Boone, 1985).

Courts have also recognized a coach's duty to properly select and match participants to ensure no athlete has been placed at a serious disadvantage (Baley & Matthews, 1989; Figone, 1989; Nygaard & Boone, 1985). Nygaard and Boone listed the following variables as factors to consider when matching opponents: (a) skill, (b) experience, (c) age, (d) maturity, (e) height and weight, (f) mental state, (g) gender, and (h) injuries or incapacitating conditions. While the concern for proper matching has historically been associated with individual contact sports, courts have recently begun to apply the matching duty to team sports as well (Figone, 1989; Nygaard & Boone, 1985).

Proper first aid, emergency, and post-injury procedures. Administrators and coaches have been required to provide a reasonable standard of medical care to injured participants (Nygaard & Boone, 1985; Wong, 1994). A duty to obtain prompt and competent medical treatment for an injured participant, as well as a duty to avoid actions which would aggravate the injury have been imposed by the courts (Korpella, 1971c; Nolte, 1979; Nygaard & Boone; Wong). Nygaard and Boone stated that coaches should be competent in first aid techniques, but are not required to have extensive medical training as long as they can activate the "emergency medical system" (p. 69) when necessary. Nolte suggested that supervisors err on the side of treating injuries as more serious than may actually be the case. Nolte also recommended that supervisors limit initial treatment of injuries to first aid only until qualified medical personnel arrive and assess the situation. Wong stated that many states require medical personnel to be in attendance at events or at least "'reasonably' available" (p. 423). Finally, Figone (1989) stated that all circumstances surrounding an injury be thoroughly documented and this documentation be filed and retained indefinitely. Figone maintained long-term retention of documentation is necessary because of the fact that, in some states, minors may file suit for up to three years after reaching maturity.

Wong (1990) specifically addressed medical issues involving intercollegiate athletics and warned administrators to be particularly aware of liability

issues surrounding the medical condition of athletes. Specifically, Wong listed participant screening, availability of medical assistance and equipment, proper emergency care procedures, and a clearly defined decision-making process for clearing athletes to resume participation after injuries as areas to which administrators should pay particular attention. Wong argued that this is necessary because a university may be held vicariously liable for medical personnel's actions, as well as coaches', if they are employed by the institution. Wong also warned administrators to be aware of the potential conflict of interest for medical personnel who are employed by a university athletic department and charged with determining when athletes are medically able to compete.

Safe and proper facilities. In addition to the above duties which are owed athletes, administrators have been required to provide safe and proper facilities to both participants and spectators (Champion, 1993; Gaskin, 1986/1987; Korpella, 1971a; Nolte, 1979). Gaskin stated that institutions have a "duty to exercise reasonable care to protect both participants and spectators from dangerous conditions" (p. 143). Gaskin added that, while participants and spectators both assume the risks associated with a particular activity, they do not assume the risk of a defective facility.

Athletes and spectators can reasonably expect a safe facility because they have generally been classified as business invitees of the facility possessor (Champion, 1993; Wong, 1994). An invitee has been characterized

as a person invited to a facility and one whose visit will provide a real benefit to the occupier (Korpella, 1971a; Wong). The duty owed invitees has been one of reasonable care to provide a safe environment, to discover any facility defects, and to correct known defects or provide warnings of unsafe conditions (Black, 1991; Champion, Wong). The occupier/possessor of a facility has not, however, been considered the insurer of the invitee's safety and, therefore, not been required to guarantee the invitees safety under all circumstances (Champion; Wong). Nolte (1979) stated that courts will consider the institution to have taken proper precautions "if the premises are maintained in a safe condition, and security guards sufficient to the occasion are posted" (p. 20).

Unlike an invitee, a licensee is a person who enters a facility with the owner's permission for his or her own purposes (Black, 1991; Wong, 1994). A licensee has been owed a lesser degree of care than a invitee. Formerly, a licensee was owed only the duty to refrain from "willful, wanton, and reckless conduct" (Black, p. 635), but now more commonly owed a duty of ordinary care (Black; Wong).

Gaskin (1986/1987) developed a list of guidelines for use by administrators and coaches to ensure their facilities are less likely to become the focus of litigation. Gaskin stated that facilities should be inspected regularly, following specific inspection criteria to ensure they "meet the standard considered usual and customary for such facilities" (p. 144). Gaskin added

that administrators must realize that constructive notice has been found to be as binding as actual notice. Gaskin suggested that administrators plan facilities according to the expected crowd size, realizing that courts impose a higher standard of care on proprietors of events which attract a large crowd than those of smaller events which charge no admission. Gaskin also recommended that facilities be used for their intended purposes only, that playing fields be free of all obstacles, and that gymnasiums only have safety glass in windows and doors.

### CHAPTER III

#### METHODOLOGY

"Legal research . . . is the process of finding the law that governs activities in human society" (Cohen & Olson, 1992, p. 1). While this study was one of legal research, it was, more specifically, an analysis of litigation relating to intercollegiate athletics. Rombauer (1991) has stated that no universal formula exists for conducting legal research which is applicable to all problems. Rather, certain research guidelines have been suggested and the researcher must then adapt the methodology to his or her particular problem (Barkan, 1990; Rombauer).

The methodology employed in this study was relatively straight-forward, although a combination of traditional legal research used by practicing attorneys and law students, and non-traditional methods of litigation analysis used by scholars in an academic setting. The conceptual research framework was that of traditional legal research as described by Barkan (1990) and Rombauer (1991). The use of a non-traditional litigation analysis format was derived from numerous studies examining legal issues in athletics and physical education (Appenzeller, 1988/1989; Cooke, 1992/1993; Dailey, 1985/1986; Enos, 1989; Gaskin, 1986/1987; McFadden,

1989/1990). Gaskin described a study such as this as an "analytical, interpretative study" (p. 5).

### Computer-Assisted Legal Research

The primary method for locating case law for this study was computer-assisted legal research (CALR). Computer-assisted legal research is the conventional term which has been used to describe the process of accessing commercial legal databases to retrieve various types of legal information (Rombauer, 1991). Two such databases, LEXIS and WESTLAW, have become very popular and useful to attorneys, law students, and researchers. LEXIS, a service of Mead Data Central, was the service utilized extensively for this study.

Computer-assisted legal research systems have provided researchers many advantages over more traditional printed or "manual" legal research tools. Teply (1989) argued "the strength of computer-assisted legal research lies in its speed, accuracy, thoroughness, and flexibility" (p. 97). Sprowl (1981) contended that a computer-assisted legal research system's greatest strength is its ability to act as a "generic retrieval mechanism that can duplicate the performance of virtually all the manual research tools and that provides many new retrieval mechanisms as well" (p. 150). This has allowed researchers to formulate their own unique search requests rather than relying on indexed printed material which can often lack completeness, specificity, and flexibility (Rombauer, 1991).



Specificity and flexibility were important considerations when developing a methodology for a litigation analysis study such as this. Flexibility in formulating search requests was particularly valuable when focusing searches on case law dealing with a specific topic such as intercollegiate athletics. Sprowl (1981) contended that these unique search requests are possible because any key word or phrase chosen by the researcher will link him or her to any case which contains that key word or phrase. Thus, instead of being constrained by a manual index, the researcher has access to indexes which have been "created by the judges who wrote the case decisions" (Sprowl, p. 151).

Computer-assisted legal research services have also been much more comprehensive in coverage and more time-sensitive than printed case reporter series. Cohen and Olson (1992) have stated that these on-line systems report court decisions published in official and commercial reporters. Additionally, many slip opinions of cases not published in traditional printed reporters have been available on LEXIS. This information has been made available to researchers much sooner than it would have been through traditional printed reports. Many court decisions have been available on LEXIS the very day they are announced (Cohen & Olson, 1992).

There are, however, disadvantages to computer-assisted legal research. One such disadvantage has stemmed from the system's great flexibility in searching for any key word or phrase. Sprowl (1981) argued that because

the computer only searches for the words chosen by the researcher and has no mechanism for providing additional information, it cannot "channel a researcher's thinking in the same way that a manually prepared index does" (p. 151). Because of this, search results have been dependent upon the quality of the researcher's query and the appropriateness and relevance of the database and file searched (Rombauer, 1991).

Another drawback to computer-assisted legal research has been the cost, which can be prohibitive. Most users pay for a subscription to the service as well as a fee for time spent on-line (Cohen & Olson, 1992). This user fee has made it imperative for researchers to be proficient with the services, enabling them to maximize the usefulness of time spent on-line. Many institutions, such as law schools, have paid flat-rate subscriptions which allow unlimited on-line use. This allows for training and on-line experimentation and no extra cost (Rombauer, 1991).

Computer-assisted legal research was chosen as a research tool for this study for several reasons. First, because of the time-sensitive nature of this study, a computer-assisted legal research system was the only means available to ensure comprehensive access to current case law. As Rombauer (1991) stated, "use of CALR systems is necessary in order to have the most current information" (p. 327). Secondly, the specificity of a computer-assisted legal research system was viewed as a tremendous asset. Sprowl (1981) stated that computer-assisted legal research "excels

at permitting the researcher to carve out from a large case collection a subset of cases relating to a particular topic . . . and is also an excellent tool for capturing all the cases in a given area" (p. 154). Lastly, computer-assisted legal research, and more specifically LEXIS, was chosen because of its availability to the researcher and its power in identifying case law involving intercollegiate athletics.

### Conceptual Research Framework

Although the format chosen for this study was a non-traditional litigation analysis format, the conceptual research framework employed, and process through which the research was conducted, was that of a traditional legal research pattern. The framework selected for this study was the following four-step research pattern as presented by Barkan (1990):

1. Identify and analyze the significant facts.
2. Formulate the legal issues to be researched.
3. Research the issues presented.
4. Update (pp. 15-21).

The processes undertaken to fulfill the requirements of the above four steps have been detailed below.

#### Step 1: Identify and Analyze the Significant Facts

A determination and integration of the facts and legal issues involved in this study was vital in defining the direction and scope of the research. Initially accomplishing this preliminary procedure was consistent with the

process outlined in Cohen and Olson (1992), Dailey (1985/1986), Jacobstein and Mersky (1987), and Rombauer (1991).

The delimitations of this study were, in essence, the significant facts with which to begin research. These facts were: (a) lawsuits involving college or university athletic departments; (b) the period of January 1, 1990 through December 31, 1995; and (c) cases heard in federal courts or state appellate-level courts or higher.

#### Step 2: Formulate the Legal Issues to be Researched

Traditionally, most legal research has been conducted with a specific problem or issue in mind and cases relating to that point of law were researched for precedent. Conversely, this study required preliminary searches to be accomplished in order to determine the areas of law which pose the greatest threat to collegiate athletic departments. This determination was based on the proportion of cases found in each area of law. The areas of law which contained the most litigation then became the legal issues to be researched.

Because determining the legal issues to be researched was a somewhat complicated task, this step has been further subdivided as follows: (a) develop LEXIS search requests, (b) select relevant cases, (c) combine redundant cases, (d) determine prevailing areas of litigation, and (e) develop a typology to classify cases within the prevailing areas of litigation.

Develop LEXIS search requests. Identification of relevant cases was accomplished primarily through LEXIS searches. As stated earlier, the success of a computerized search is dependent upon the quality of the search request. As a result, the development of appropriate and comprehensive search requests was the single most important factor in ensuring a valid and relevant study. Cohen and Olson (1992) understood the importance of a quality search request when they stated "preliminary preparation for a search, including analysis of the problem and careful selection of search words and connectors, is essential for effective database research" (p. 86).

The process used in this study for formulating a LEXIS search request was outlined by Jacobstein and Mersky (1987):

1. Identify the elements of the problem.
2. Select the elements to be searched.
3. Express the elements in key words.
4. Join the key words with connectors (p. 435).

Special attention was paid to selecting the appropriate key words for the search and properly linking them with connectors. Key words were the "indexes" which identified relevant cases, but too many key words could have eliminated cases that were applicable but simply failed to contain one or more of the key words. Therefore, judicious selection of key words was imperative.

To achieve the desired relationship between key words, appropriate connectors were necessary. Boolean logic, or "a set of rules for linking concepts together into a descriptive profile" was used to determine the proper use of the connectors "'and,' 'or,' and 'not' to link, combine, or exclude terms that describe concepts" (Lowery & Cody, 1993, p. 156).

After a preliminary search request was formulated by the researcher, an expert on the use of LEXIS from the United States Air Force Academy Department of Law was consulted. Determinations of the appropriate LEXIS library and file to search, and refinements to the original search request were made. It was determined that all searches would be conducted in the "Mega" file of the "Mega" library which included all federal court decisions since 1789 and appellate decisions from all state court systems. The resultant LEXIS search request was as follows:

Name(university or college) and athlet! and date(> 1/1/1990 and <1/1/1996)

The above search request identified 193 cases.

Additionally, the researcher received a one-on-one training session with the LEXIS Government Information Services Representative who was at the United States Air Force Academy to conduct training for the Department of Law faculty members. After a discussion of the project objectives and a

review of the original search request, two supplemental search requests were developed to ensure all relevant cases were identified. The supplemental search requests were as follows:

Name(university or college) and sport and date(> 1/1/1990 and < 1/1/1996) and not athlet!

Name(university and college) and physical education and date(> 1/1/1990 and < 1/1/1996) and not athlet! or sport

The above search requests identified an additional 56 cases not previously identified in the original search.

Select relevant cases. Because computer-assisted legal research is dependent upon key word searches, many cases were identified as containing key words or phrases but were irrelevant to the subject at hand. Therefore, it was necessary that each case identified be reviewed individually to determine its applicability. Of the 249 cases identified by the LEXIS searches, 106 cases were determined to be relevant.

Combine redundant cases. As a lawsuit proceeds through the judicial system, it may be appealed or remanded several times. Because of this, the same case has often been reported on LEXIS more than once as it winds its way through the courts. Additionally, many cases have been reported under different titles (Imber & Thompson, 1991). Therefore, it was

imperative to review each relevant case thoroughly and combine redundant cases. This ensured an accurate count of cases in each major area of law and prevented a case which had been appealed several times from skewing the proportion of cases in each area. Of the 106 identified cases determined to be relevant, 21 were redundant.

Determine prevailing areas of litigation. After classifying all relevant cases according to the legal issues involved, it was evident that three areas of law were clearly more susceptible to litigation than others (see Appendix A). These three areas, (a) gender equity, (b) contract disputes, and (c) tort liability, were the legal issues involved in 72% of the identified relevant cases.

Develop a typology to classify cases within the prevailing areas of litigation. After identifying the three major areas of litigation, a typology was developed to classify the cases within these three areas (see Table 1). This typology was developed by modifying portions of Imber and Thompson's (1991) typology of education litigation.

### Step 3: Research Issues Presented

Once the prevailing legal issues of this study were established, they required thorough research. There are two sources of information, or authority, in which to research the law. Primary sources, or "recorded rules which will be enforced by the state" (Cohen & Olson, 1992, p. 3), include statutes, administrative regulations, and appellate court decisions (Cohen &



Table 1

Typology of Major Areas of Litigation Involving Intercollegiate AthleticDepartments

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## I. Gender Equity

- A. Suits by female students
- B. Suits by male students
- C. Suits by employees

## II. Contract Disputes

- A. Suits by employees
- B. Suits by students
- C. Suits by contractors

## III. Tort Liability

- A. Negligence
    - 1. Supervision/instruction
    - 2. Facilities/equipment
  - B. Defamation
-

Olson). Secondary sources "are publications containing textual analyses and syntheses of primary materials" (Rombauer, 1991, p. 124). Secondary materials may include legal encyclopedias, treatises, and law reviews (Barkan, 1990). Barkan recommended that the researcher read all relevant statutes, constitutional provisions, and secondary source material before analyzing applicable case law.

An extensive review of secondary materials was conducted for this study. Current books on sport management and sport law were researched for pertinent background information. American Law Reports, a series of annotated reports, was referenced for clarification of the legal issues relevant to this study. Numerous LEXIS searches were conducted to identify applicable law review articles. Dissertation Abstracts International was searched from 1985-1995 using a series of eight key words to highlight dissertations which could be related to this study in any way. Sport Discus and Infotrac searches were conducted to locate any miscellaneous information. All editions of Sports and the Courts and Athletic Business since 1990 were reviewed for comment on applicable cases. As a result of the review of secondary materials, an additional eight relevant cases not located in LEXIS searches were identified.

While research of applicable case law has always been a vital element of legal research, it was particularly important in this study as litigation analysis was the focus of the entire study. Simply stated, case law was the

object of the research, while law review articles and other secondary sources were the tools of research.

In essence, the primary objective for gaining an understanding of previous court rulings is to predict how a court may rule in the future on a similar, if not identical, issue. Technically, courts have been bound by previous rulings in cases of mandatory authority only (Teply, 1989). In practical applications by sport administrators, however, even persuasive authority and dicta can be compelling in illustrating how courts have decided on a particular issue. Rombauer (1991) characterized dicta as language in an opinion stating what the court's decision would have been given a different set of circumstances. Therefore, court opinions were the primary data of this study.

As a result of relying on court decisions for data, what Rombauer (1991) termed as the "prediction element" (p. 13) of legal problem solving was required. Rombauer stated that to determine what controlling law a court will "probably" apply depends upon the "meaning and direction of development" the court attaches to previous cases examining similar issues (p. 12).

To understand the meaning and direction of development which may be attached to a particular case, and to be able to intelligently predict future rulings in similar cases, Rombauer (1991) forwarded a process requiring three basic skills. These three skills were "analysis, evaluation, and synthesis" (Rombauer, p. 12). Rombauer's process leads to exactly what was

intended of this study, which was a thorough analysis and integration of applicable case law. For the purpose of this study this process was called litigation analysis and each of Rombauer's three skills has been highlighted below.

Analysis. The analysis of a case was much the same as a brief, or opinion summary would have been. In addition to summarizing the case, however, an objective of the analysis was to extract "the underlying principle, the *ratio decidendi* of a case" (Rombauer, 1991, p. 12). Rombauer outlined five key elements of a case with which a researcher performing an analysis should be particularly concerned. These five elements were: (a) the significant facts; (b) the relevant procedural details; (c) the issues, questions, or legal principles before the court; (d) the decision; and (e) the rationale behind the decision.

An analysis worksheet was developed for this study to aid the researcher in identifying, extracting, and outlining the key elements listed above from the cases analyzed (see Appendix B). This worksheet was developed through significant modification of a "coding sheet" used by Gaskin (1986/1987, p. 16).

Evaluation. After reaching an understanding of a court's decision, the researcher "must then make a critical judgment of the court's conclusion and reasoning" (Rombauer, 1991, p. 13). This was necessary to determine the extent to which this precedent will be followed by other courts in the

future (Rombauer). The prediction of the strength of each case's precedence was the essence of the evaluation phase.

Because this study was designed to be an educational tool to athletic administrators across the country, broad-brush statements of precedent were difficult because of differences in mandatory and persuasive authority. Therefore, except for the cases in which the decisions were clearly of landmark proportions, the issue of precedent was not explicitly addressed. Instead, cases in each area were thoroughly analyzed and recommendations were based on the resulting synthesis.

Synthesis. Synthesis was the final step in litigation analysis and the activity which made a study such as this worthwhile. Synthesis was the process of relating and combining court opinions relevant to a particular problem or issue (Rombauer, 1991). Oftentimes, several cases related to a similar problem and it was the researcher's duty to integrate the opinions and define similarities, differences, and trends as they existed.

Rombauer (1991) presented a four-step approach to the synthesis process:

1. Are the cases factually similar? Do they present the same legal questions?
2. If the answer to either question above is yes, then are the decisions consistent with one another?

3. Combined, do the decisions suggest a more or less general rule of law than the individual cases do alone?

4. If the decisions are inconsistent, return to the evaluation phase to determine which opinion presents a more persuasive solution.

#### Step 4: Update

Updating was simply the process of ensuring the legal issues and judicial rulings discussed in the study were current and had not been overruled by subsequent cases or legislation (Jacobstein & Mersky, 1990). Updating, also referred to as case verification (Rombauer, 1991) or citation verification (Gongla-Coppinger, 1994), has traditionally been accomplished through the use of a legal citator, the most comprehensive of which is Shepard's Citations (Cohen & Olson, 1992). Use of Shepard's Citations has allowed researchers to trace the judicial history of a particular case, discover its parallel citations, verify its current status, and identify later cases which have cited it (Cohen & Olson; Teply, 1989). Full text of Shepard's Citations is available on LEXIS covering approximately 600 reporters (Gongla-Coppinger, 1994).

LEXIS also provided a much more accurate tool for verifying the validity and accuracy of cases which were examined in this study. *Auto-cite* was much more accurate than Shepard's Citations because it was "current within a few days of new opinions" (Rombauer, 1991, p. 283). Cohen and Olson (1992) recommended that *Auto-cite* be used for research such as

this, which examined case law that may post-date the latest Shepard's Citations supplement. Rombauer argued "**EVERY CASE CITED**" (p. 283) should be verified through an on-line service such as *Auto-cite*. Therefore, each case examined in this study was verified through the use of *Auto-cite* and Shepard's Citations, fulfilling the "update" requirement of Barkan's (1990) research framework.

### Organization

The analysis and evaluation of litigation was divided into three chapters. Chapters IV through VI consisted of specific analysis of each of the cases classified in the three areas of prevailing litigation: (a) gender equity, (b) contract law, and (c) tort liability. Analysis of litigation in these chapters was arranged according to the typology outlined in Table 1. The individual cases within each classification are presented in reverse chronological order according to the most recent decision of each case. Synthesis of cases within the major areas of law was accomplished in Chapter VII. A comprehensive listing and classification of all identified cases used in this study was provided in Appendix A.

## CHAPTER IV

### ANALYSIS OF GENDER EQUITY LITIGATION

#### Suits by Female Students

##### Cohen v. Brown University (1992/1993/1995)

Facts. In May 1991, Brown University announced that it was demoting four varsity teams; men's golf, men's water polo, women's gymnastics, and women's volleyball, to intercollegiate club status. These cuts were in response to a directive to cut 5-8% from the entire university budget. In April 1992, members of the women's gymnastics and volleyball teams filed a class action suit against Brown University, its president, and its athletic director for alleged violations of Title IX of the Education Amendments of 1972 (Title IX). Although a private institution, Brown is subject to Title IX compliance because it receives federal financial assistance. The plaintiffs sought injunctive relief to restore their teams to varsity status and to prevent further elimination or reduction of women's sports in the 1992 case which was heard on appeal in 1993. The 1995 case was the actual trial on the merits to determine if Brown was in violation of Title IX directives.

Prior to the program cuts, Brown sponsored 16 men's varsity sports accounting for 63.3% of the athletic opportunities available and 15



women's varsity sports accounting for 36.7% of the athletic opportunities. Eliminating two women's programs as well as two men's program allowed the percentage of available athletic opportunities to men and women to remain virtually unchanged at 36.6% female athletes and 63.4% male athletes. By the 1993-1994 school year, the ratio of male to female athletes at Brown had changed very little with 61.9% of the student-athletes being male and only 38.1% female. The undergraduate enrollment at Brown was 52.4% men and 47.6% women in 1990-1991 and 48.9% men and 51.1% women in 1993-1994.

Arguments. The plaintiffs argued that Brown's actions perpetuated the discriminatory treatment of female students by failing to provide women with an equivalent number of participation opportunities as was provided their male counterparts. The plaintiffs also argued that Brown failed to fully accommodate the athletic interests and abilities of female students. Brown contended that it provided participation opportunities which were "substantially proportionate to the ratio of men to women among students interested in participating in varsity athletics" (Cohen, 1995, p. 204). Brown further argued that it could legally accommodate less than all the interested and able women if it proportionally accommodated less than all the interested and able men as well.

Decision/rationale. On December 22, 1992, a preliminary injunction was granted the plaintiffs restoring women's gymnastics and volleyball to varsity

status and preventing further reduction or elimination of women's varsity sports at Brown until a trial on the merits could be conducted. This decision was upheld by the First Circuit Court of Appeals on April 16, 1993. When deciding on a motion for a preliminary injunction, the court evaluated four factors: (a) the likelihood the plaintiffs will be successful in the trial on the merits, (b) the potential for irreparable harm if the plaintiffs' motion is denied, (c) the balance of interests between the parties, and (d) the public interest involved.

On December 16, 1994 a settlement agreement was reached in regard to the plaintiff's claims that a significant disparity existed between the financial support and benefits given to the men's and women's varsity programs. Therefore, the 1995 opinion focused primarily on the plaintiffs' claims that a disproportionate number of athletic opportunities existed for men as opposed to women. To address this issue, the court applied the three-pronged test outlined in the Title IX Policy Interpretation (1979) to determine if Brown had effectively accommodated the interests and abilities of students of both sexes in its athletic program.

Brown failed to satisfy the first prong of the test which asks if the participation opportunities for both genders are "substantially proportionate to their respective enrollments" (Cohen, 1995, p. 200). The District Court rejected Brown's argument that a liberal interpretation of "substantially proportionate" be applied in favor of the university and that only students

interested in intercollegiate participation be used as the comparative baseline versus the entire undergraduate enrollment.

Brown also failed prong two of the Policy Interpretation test which requires an institution to demonstrate a "history and continuing practice of program expansion" (Cohen, 1995, p. 207) for the underrepresented gender. Although Brown created an entire women's athletic program in 1971 when it merged with Pembroke College and began admitting women, since 1977 it had only added indoor track in 1982 and skiing in 1994 to that program. So while the court acknowledged an impressive history of program expansion in the 1970s, it ruled that Brown had failed to demonstrate a continuing practice of program expansion for women.

Lastly, Brown failed prong three of the test which allows an institution to have a disproportionate representation of athletic opportunities if it has fully and effectively accommodated the interests and abilities of the underrepresented gender. The court ruled that this was not the case at Brown. The interests and abilities of the plaintiffs were clearly evident by the fact that they belonged to existing teams that successfully competed at the varsity level. Further, these interests and abilities were not fully and effectively accommodated when these teams were demoted to "donor-funded" or club status.

As a result of failing the three-pronged test, the United States District Court of Rhode Island found Brown University to be in violation of Title IX

mandates. The court further ruled that Brown's two-tiered intercollegiate athletic structure, which allowed for university-funded as well as donor-funded programs, "failed to provide equal treatment of athletes" (Cohen, 1995, p. 186). Judge Pettine, however, failed to prescribe a specific remedy to achieve compliance stating he had "no desire to 'micromanage' Brown's athletic program" (Cohen, 1995, p. 214). Instead, Pettine outlined several options from which Brown could choose the most desirable: "It [Brown] may eliminate its athletic program altogether, it may elevate or create the requisite number of women's positions, it may demote or eliminate the requisite number of men's positions, or it may implement a combination of these remedies" (p. 214). The court then upheld the existing preliminary injunction and ordered Brown to submit a comprehensive plan for bringing their program into Title IX compliance within 120 days from the ruling.

Favia v. Indiana University of  
Pennsylvania (1993a/1993b)

Facts. In 1991, the Indiana University of Pennsylvania (IUP) Department of Athletics was instructed to cut \$350,000 from its budget. As a result, IUP announced it would eliminate the men's soccer and tennis teams as well as the women's field hockey and gymnastics teams beginning with the 1992-93 school year. Members of the women's field hockey and gymnastics teams filed a class action suit against IUP, its president, and its athletic director claiming the university violated Title IX through gender

discrimination when it cut the women's programs. The plaintiffs sought a preliminary injunction reinstating the programs to varsity status.

At the time of the cuts, the undergraduate population at IUP was 55.6% women but women athletes comprised only 37.8% of the athletes and received only 21% of the athletic scholarships. After the elimination of the four programs, 36.5% of the athletes were female. The number of men's and women's teams were equal at nine before the cuts and seven after, but spending disparities were evident with only \$2.75 spent on women's programs for every \$8.00 spent on men's.

The United States District Court for the Western District of Pennsylvania issued a preliminary injunction reinstating the women's field hockey and gymnastics teams in February 1993. The university's subsequent motion to modify the injunction was denied by the district court and IUP appealed to the Third Circuit Court of Appeals.

Arguments. The plaintiffs argued "that IUP fostered disparities in athletic participation opportunities on the basis of gender by providing disparate levels of support to male and female athletes and by allocating athletic scholarships in a gender discriminatory way" (Favia, 1993a, p. 579). The defendants argued that fiscal matters drove the cuts and that equal numbers of men's and women's programs were eliminated. They stated that women's gymnastics and field hockey were chosen for elimination because of the nationwide decline in participation in these sports. IUP further stated

that they planned to replace women's gymnastics and field hockey with women's soccer in the near future, dependent upon financial constraints.

In their motion to modify the initial preliminary injunction, IUP sought to replace the gymnastics team with a women's soccer team. IUP claimed this would bring the university closer to Title IX compliance by increasing the percentage of female athletes at the institution to 43%. After the district court denied the motion to modify, IUP appealed arguing that, not only had the district court erred in its denial, but that the circumstances leading to the injunction had changed significantly making continued enforcement of the injunction inequitable. IUP contended that the graduation of the original plaintiffs was a sufficient change in circumstances to warrant modification.

Decision/rationale. The preliminary injunction was originally issued based on the fact that IUP failed all three prongs of the "effective accommodation" test. Before the cuts, only 37.8% of the athletes at IUP were women and this inequity was exacerbated with the cuts when the percentage dropped to 36.5%. Defendants failed to show a history of women's program expansion, and the promise to elevate the women's soccer club to varsity status in the future was not enough to satisfy the court. Judge Cohill stated, "You can't replace programs with promises" (Favia, 1993a, p. 585). Lastly, while the court conceded that IUP honored its scholarship commitments to female athletes whose teams were cut, this was not

determined to be full and effective accommodation of their interests and abilities because their participation opportunities had been eliminated.

The Third Circuit Court of Appeals affirmed the District Court's decision to deny IUP's motion to modify the preliminary injunction because IUP "failed to meet its burden of demonstrating a 'significant' change in facts" (Favia, 1993b, p. 344). First, the court noted that the graduation or ineligibility of the original plaintiffs was not significant enough to allow a modification of the injunction by replacing gymnastics with women's soccer. Next, the court noted that the intent of a preliminary injunction is to maintain the status quo until a trial on the merits can be heard and final relief determined. If gymnastics were replaced with soccer, an entire class of plaintiffs would be denied the athletic opportunities protected by the preliminary injunction. Additionally, the court was not convinced that replacement of gymnastics with soccer would move IUP closer to Title IX compliance. Although the female participation ratio would increase by 4%, the expenditures on female programs would decrease by approximately \$100,000.

Roberts v. Colorado State University (1993) and Roberts v. Colorado State Board of Agriculture (1993)

Facts. Colorado State University (CSU) announced it was dropping its women's softball program and men's baseball program on June 1, 1992, because of budget considerations. Four members of the softball team filed

suit as individuals against CSU and its controlling body, the Colorado State Board of Agriculture, seeking reinstatement of the softball team and damages under Title IX. The United States District Court for the District of Colorado issued a permanent injunction reinstating the softball team and the Colorado State Board of Agriculture appealed.

After the softball team was cut, the disparity between women undergraduate enrollment and women athletic opportunities at CSU was 10.5%. The average disparity between enrollment and participation over the previous twelve years had been 14.1%.

Arguments. The plaintiffs argued that CSU was in violation of Title IX when it terminated the women's softball program by failing to fully and effectively accommodate the interests and abilities of the female athletes at CSU. The plaintiffs claimed that CSU failed all three prongs of the "effective accommodation" test as outlined in the Title IX Policy Interpretation.

The defendants provided arguments for compliance with each prong of the "effective accommodation" test. First, CSU maintained that, as a matter of law, a disparity rate of 10.5% between enrollment and participation is substantially proportionate. They next pointed to the creation of a women's athletic program and its dramatic expansion to 11 varsity sports in the 1970s. Finally, CSU maintained that full and effective accommodation of women's athletic interests and abilities was not required if the institution did



not fully and effectively accommodate all of the athletic interests and abilities of male students either. Instead, CSU maintained that it was obligated to accommodate the interests and abilities of female students only to the extent it accommodates the male students. CSU pointed to the fact that men's baseball was cut as well as women's softball, adversely affecting more male athletes than female athletes.

On appeal, the defendants held that the district court erred in determining that discriminatory intent need not be shown by the plaintiffs. The defendants incorrectly argued that discriminatory intent must be shown before a violation of Title IX can be found.

As to the remedy and relief ordered by the district court, the defendants made two objections. First, the defendants argued that plaintiffs were "made whole" through the awarding of damages and, therefore, injunctive relief was unnecessary and inappropriate. Secondly, the defendants argued that they should have been allowed to present the district court with their own plan to comply with Title IX rather than be ordered to reinstate a complete softball program with its associated administrative functions.

Decision/rationale. With regard to the permanent injunction issued by the district court, the Tenth Circuit Court of Appeals affirmed in part, reversed in part, and remanded with instructions. The Tenth Circuit Court agreed that CSU was in violation of Title IX and failed all three prongs of the "effective accommodation" test. The court ruled that a 10.5% disparity

between women's enrollment and participation opportunities was not substantially proportionate. The court relied on examples in the OCR Investigator's Manual, expert testimony, and results of a 1983 OCR compliance review of CSU which found a three-year average disparity of 10.9% to not satisfy the substantially proportionate requirement. The court also failed to embrace CSU's claim of a history of program expansion for women. The court cited a steady decline of women's participation opportunities throughout the 1980s. This rate of decline was 14% higher than the rate of decline of the men's participation opportunities. After adding women's golf in 1977, no other women's sports were added while three were dropped. The Tenth Circuit Court then agreed with the district court that the interests and abilities of the underrepresented gender, particularly the plaintiffs, were not being met. The court concurred with the plaintiffs' testimony which pointed to prior participation and success of the softball team at CSU, a full schedule within their conference, and the increasing popularity of high school softball in Colorado as evidence of interest and abilities which would not be accommodated with the elimination of softball at CSU.

The Tenth Circuit court also ruled on the defendants' objections to the district court's remedy. First of all it affirmed the district court's ruling that injunctive relief was appropriate regardless of damages awarded because "monetary relief alone is inadequate" (Roberts v. Colorado State Board of Agriculture, 1993, p. 833). Next the court addressed the issue of whether

the district court abused its discretion by prescribing the specific course of action for CSU to follow in arriving at Title IX compliance. The defendants felt the district court order required them to field a women's softball team indefinitely and instead they should be allowed to chart their own course towards compliance. The court stated that if this were a class action suit, the defendants may have had a valid argument, but as individual plaintiffs the softball players had a right to individual relief. That relief was an injunction to reinstate their team. Additionally, because it was not a class action suit, CSU was not necessarily required to sponsor a softball team indefinitely. Once all the plaintiffs became ineligible, the institution could petition the court to dissolve the injunction. The court went on to note that if CSU realigned its entire athletic program to comply with Title IX directives, it would no longer be required to sustain its softball program. This is because the "softball team is predicated upon the defendant's Title IX violation, if that violation were remedied" the "plaintiff's entitlement to individual relief would evaporate" (Roberts v. Colorado State Board of Agriculture, 1993, p. 834).

The Tenth Circuit Court did, however, agree with one aspect of the defendants' argument that the district court micromanaged its softball program. The court ruled that the district court exceeded its authority in ordering CSU to participate in a Fall 1993 exhibition season. This practice had never been done before at CSU, but the district court felt it was

necessary in order for CSU to "field a 'competitive' team the following spring" (Roberts v. Colorado State Board of Agriculture, 1993, p. 835). The Tenth Circuit Court held that nothing in the language of Title IX requires an institution to develop a highly successful program, nor does the district court have the authority to ensure a successful season. Therefore, the Tenth Circuit Court reversed this part of the permanent injunction and remanded the case to the district court with instructions to modify it in accordance with the circuit court's opinion.

Cook v. Colgate University  
(1992/1993)

Facts. Colgate University sponsored a men's varsity hockey team which was a member of the Eastern Collegiate Athletic Association and eligible to compete in the National Collegiate Athletic Association (NCAA) Division I hockey tournament. Women's hockey was a club sport at Colgate and received only 2% of the university funding that the men's team received in 1990-1991. Additionally, the women were required to pay annual dues ranging from \$25 to \$30 to participate on the team. No dues were required of the members of the men's team.

In 1979, 1983, 1986, and 1988, representatives of the women's club hockey team petitioned Colgate to elevate their program to varsity status. In each instance, Colgate denied the petitioner's requests citing four reasons: (a) women's ice hockey is rarely played on the collegiate level, (b) championships are not sponsored by the NCAA, (c) women's ice hockey is

played at approximately 15 colleges in the East, and (d) hockey is expensive to fund. As a result, five members of the women's club hockey team filed suit against Colgate University in 1990 claiming Title IX violations as a result of unequal treatment based on gender. The United States District Court for the Northern District of New York ordered Colgate to elevate women's ice hockey to varsity status for the 1993-1994 season and the university appealed.

Arguments. In the original case, Colgate argued that the plaintiffs' case should fail for two reasons. First, Title IX prohibits gender discrimination in an athletic program as a whole. It does not address specific sports, which is the focus of the plaintiffs' case. Secondly, if Colgate's first argument was rejected by the court, the university contended that, although the sport was the same, it would be improper to compare a men's varsity program with a women's club program.

The plaintiffs argued that gender discrimination was at the heart of their complaint. To prove this, they proposed the three-step process used to determine gender discrimination in Title VII cases be employed by the court. This burden-shifting analysis requires the plaintiffs to first establish a prima facie case of discrimination. If the plaintiffs can do so, the burden shifts to the defendants to demonstrate that their actions are driven by non-discriminatory factors. Once this is done, the burden shifts back to the

plaintiff to prove that the reasons forwarded by the defendants are merely a smoke screen to mask the discriminatory nature of their actions.

The plaintiffs established their prima facie case of discrimination through the introduction of six areas in which they claim Colgate violated Title IX by discriminating against them. These areas were: (a) expenditures, (b) equipment, (c) locker room facilities, (d) travel, (e) practice times, and (f) coaching.

Colgate advanced the four reasons it had previously stated as legitimate nondiscriminatory reasons to deny equal treatment to the women's ice hockey program. Two additional reasons were also forwarded by Colgate at the trial: (a) a lack of student interest in women's ice hockey, and (b) a lack of ability of the club members to compete at the varsity level.

On appeal, Colgate argued that the action taken by the District Court in the original trial was rendered moot because each of the plaintiffs would have graduated before the beginning of the 1993-1994 season. Given the District Court's order for Colgate to establish a varsity women's ice hockey program beginning with the 1993-1994 season, Colgate argued that since none of the plaintiffs could benefit personally from that remedy, it necessarily rendered the action moot. The plaintiffs argued that this decision lies within the exception to the mootness doctrine because it addresses a situation which is "capable of repetition" (Cook, 1993, p. 19).

Decision/rationale. The District Court quickly dismissed Colgate's claims that the plaintiffs should fail based on the comparison of the overall athletic program at Colgate and the inappropriateness of comparing a varsity team with a club team. The court noted that Colgate sponsored 12 varsity men's sports and 11 varsity women's sports in 1990-1991, at expenditure levels of \$654,909 and \$218,979 for men and women respectively. In the court's opinion, this was clearly a program favoring the men. The court also rebuked Colgate's argument that comparing the men's and women's ice hockey teams was like comparing "apples to oranges" (Cook, 1992, p. 743) because of the varsity status of one and the club status of the other. Because Colgate determines which teams enjoy varsity status, the court reasoned that an institution could forever avoid a comparison of teams by simply refusing to elevate a club team to varsity status. The court further stated that the operative word in the Title IX implementation regulations (1995) was *team*, and because Colgate sponsored separate ice hockey *teams* for men and women, they were subject to comparison.

The District Court then acknowledged the plaintiffs' prima facie case of discrimination, as demonstrated through the identification of six areas in which discrimination was evident. The next step was for the court to address the six nondiscriminatory reasons Colgate argued were justification to deny women's hockey equal treatment to that of men's hockey. The District Court agreed with the plaintiffs that none of these reasons, as

outlined by Colgate, were valid. Colgate was, therefore, not providing equal athletic opportunities to its women hockey players and found to be in violation of Title IX. As a result, the District Court ordered Colgate to elevate the women's ice hockey team to varsity status beginning with the 1993-1994 season. The court did not, however, grant the plaintiffs' request for compensatory damages.

On appeal, the United States Court of Appeals for the Second Circuit vacated the District Court judgment and remanded the case back to the District Court with instructions to dismiss the case as moot. The Circuit Court agreed with Colgate that a case becomes moot if the court loses its authority to redress the injury. In this case, when the plaintiffs became ineligible to participate on Colgate's women's ice hockey team, they became incapable of benefiting from the remedy ordered by the District Court.

The plaintiffs became incapable of benefiting from the remedy upon graduation because they filed suit as individuals, not as representatives of "'similarly situated' individuals" (Cook, 1993, p. 20) in a class action complaint. In the absence of a class action complaint, plaintiffs are able to gain an exception to the mootness doctrine only if (a) the challenged action is of such short duration as to expire before full litigation is possible, and (b) there is a reasonable expectation that the complaining parties will be subject to the same discriminatory action in the future. The Circuit Court ruled that the plaintiffs could not satisfy the second element of the above test because



they would no longer be participating in intercollegiate athletics. Therefore an exception to the mootness doctrine was not appropriate and the action vacated.

### Suits by Male Students

#### Gonyo v. Drake University (1993/1995).

Facts. On March 11, 1993, Drake University announced it was eliminating its men's varsity wrestling program at the end of the current season. The university cited financial concerns, the lack of wrestling as a sponsored sport in the conference in which Drake was a member (Missouri Valley Conference), the discontinuation of wrestling by other institutions, and the lack of student and community support for wrestling as the reasons for its elimination at Drake. The plaintiffs, five members of the Drake wrestling team before its elimination, filed a class action suit seeking a preliminary injunction ordering reinstatement of the varsity wrestling program at Drake University. After being denied the preliminary injunction in 1993, the plaintiffs sought a final decision on the merits of the case in 1995 and the defendants moved for a summary judgment.

At the time of the wrestling program's elimination, Drake sponsored seven men's varsity athletic teams and five women's teams. The overall varsity athletic participation ratio was 75.3% men and 24.7% women, while the undergraduate enrollment at Drake was 42.8% male and 57.2% female.

Of Drake's athletic scholarship budget, 47% was spent on male athletes while 53% was spent on female athletes.

Arguments. The plaintiffs claimed elimination of the wrestling program after active recruitment of wrestlers constituted not only a violation of Title IX, but that Title IX, as applied to them, was unconstitutional. The plaintiffs further argued that the wrestling program's elimination was a violation of the Fourteenth Amendment's Equal Protection Clause and a breach of contract.

The plaintiffs argued that the disparate allocation of athletic scholarships to female athletes was a clear violation to Title IX. In pointing to the unambiguous language of Title IX and the Policy Interpretation, the plaintiffs argued that 47% of the scholarships for 75% of the athletes was not "proportionately equal amounts of financial assistance" (Gonyo, 1995, p. 1004). Drake countered by maintaining this disparity could be justified by legitimate, nondiscriminatory reasons. Drake stated that the disparity in scholarships existed to remedy the underrepresentation of female athletes by enticing more women to participate in Drake's athletic program.

The plaintiffs next asserted that Title IX, as applied to them, was unconstitutional because it violated the Fourteenth Amendment's Equal Protection Clause. This claim stemmed from the fact that application of Title IX necessarily requires a consideration of gender which "may work to the disadvantage of males" (Gonyo, 1995, p. 1006).

Additional Fourteenth Amendment claims arose from the plaintiffs' claims that the Defendants, "acting under color of state law, violated their rights under the Equal Protection Clause" (Gonyo, 1995, p. 1006) by denying them the right to participate in wrestling at their college of choice. The contractual claims rose from the plaintiffs' reasonable expectation of a continuing wrestling program when they accepted their scholarships.

Drake University moved for a summary judgment in the 1995 case, averting a full trial on the merits. "Summary judgment is appropriate only where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law" (Gonyo, 1995, p. 1002).

Decision/rationale. On October 7, 1993, the United States District Court for the Southern District of Iowa denied the plaintiffs' motion for a preliminary injunction reinstating the men's varsity wrestling team at Drake University. The District Court ruled in favor of Drake in each of the four guiding considerations used by a court when deciding whether or not to issue a preliminary injunction.

First, the court did not fear irreparable harm would come to the plaintiffs without the injunction. The wrestlers were allowed to keep their current scholarships or free to transfer to another institution where they would be immediately eligible. Next, the court felt that the "state of balance" (Gonyo, 1993, p. 994) of harm weighed in favor of not issuing the injunction. The court stated that the financial harm Drake would experience by forced

reinstatement of the wrestling program, as well as the harm to the institution's academic freedom, were far greater than that which would be experienced by the plaintiffs. The next step in considering a preliminary injunction is for the court to make a determination of the plaintiffs' probability of success when the case is tried on its merits. In this case, the District Court ruled that the plaintiffs were unlikely to prevail on the merits of any of their claims against Drake. Lastly, the court weighed the public interest and determined there was a greater public interest in "permitting colleges and universities to chart their own course in providing athletic opportunities without judicial interference or oversight" (Gonyo, 1993, p. 996).

On March 10, 1995, the United States District Court for the Southern District of Iowa granted Drake University's motion for summary judgment and dismissed the case. In doing so, the court addressed each of the federal claims forwarded by the plaintiffs.

With regard to the plaintiffs' claim that Drake violated Title IX by eliminating men's wrestling while maintaining a higher proportion of scholarship funds for female athletes, the court disagreed, ruling this action did not violate Title IX. The court explained that the university's decision to reduce the athletic budget created a dilemma for the athletic department. A reduction of women's funding would aggravate the existing disparity in participation ratios, while a reduction of men's programs and corresponding scholarships would aggravate the existing disparities in scholarships. Although

Drake's public statements never cited Title IX concerns as a motivating factor for wrestling's elimination, the District Court stated that this was "a matter of dispute" (Gonyo, 1995, p. 1003). The court did, however, conclude that Drake made the correct decision because "the participation test more comprehensively serves the remedial purposes of Title IX than does the scholarship test and therefore must prevail" (Gonyo, 1995, p. 1006). Therefore, the court identified the proportional participation test as the controlling issue in this case and dismissed the plaintiffs' claim.

The plaintiffs' claim that Title IX, as applied to them, was unconstitutional was also addressed in the 1995 opinion. The court dismissed the plaintiffs' argument that consideration of gender violated the Equal Protection Clause by citing another Title IX case in which the court said "limited consideration of sex does not violate the constitution" (Kelley v. Board of Trustees, University of Illinois, 1994, p. 272). The court went on to state that "Congress has broad powers to remedy past discrimination" (Gonyo, 1995, p. 1006), and the proportional participation test is the appropriate tool to employ to determine the underrepresented gender. In Drake's case, women constituted the underrepresented gender and their consideration did not render Title IX unconstitutional when applied to men.

The final claim made by the plaintiffs which was addressed by the court was that the defendants were acting under color of state law when they eliminated the wrestling program, thereby violating the plaintiffs' rights

under the Equal Protection Clause. Because Drake University is a private institution, the District Court ruled that the defendants were private actors and in no way affiliated with the State of Iowa. This prevents the defendants from acting under color of state law and renders the plaintiffs' final claim invalid.

Kelley v. Board of Trustees  
of the University of Illinois  
(1993/1994)

Facts. On May 7, 1993, the University of Illinois announced it would eliminate men's swimming and fencing as well as men's and women's diving as varsity intercollegiate programs effective July 1, 1993. The university cited budget constraints as the primary force necessitating the cuts, but Title IX compliance considerations as well as the Big Ten's gender equity policy were also found to have influenced the decision. The University of Illinois is a member of the Big Ten Conference which adopted a Gender Equity Action Policy in 1992 requiring all member institutions to achieve a "male/female participation level of 60%/40%" ("Gender Equity Action Policy," 1992, p.1) by June 30, 1997. In 1993, 23.4% of the intercollegiate athletes at the University of Illinois were women, while women comprised 44% of the undergraduate enrollment.

On May 25, 1993, eight members of the University of Illinois men's swimming team filed suit against the university, its chancellor, athletic director, and associate athletic director alleging that the elimination of the

men's swimming team and not the women's swimming team was a violation of Title IX. The plaintiffs further alleged that their constitutional rights were violated under the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs moved for a preliminary injunction reinstating the team, while the defendants made a motion for summary judgment. The United States District Court for the Central District of Illinois granted the defendants' motion for summary judgment in the original case, and the plaintiffs appealed to the Seventh Circuit Court of Appeals.

Arguments. The plaintiffs argued that disparate treatment of the men's and women's swimming teams was clearly a result of gender discrimination and prohibited under Title IX. The plaintiffs also argued that the elimination of the men's program without a corresponding elimination of the women's program "created an illegal gender classification which denied the plaintiffs' equal protection of the law under the Fourteenth Amendment" (Kelley, 1993, p. 242).

The plaintiffs' request for a preliminary injunction was one in which they requested "gender equity, or gender equality, in sharing the loss" (Kelley, 1993, p. 244). On appeal, the plaintiffs contended that the implementing regulations and the Policy Interpretation had "perverted" Title IX, transforming it from "a statute which prohibits discrimination on the basis of sex into a statute that mandates discrimination against males" (Kelley, 1994, 270).

The defendant university argued that the elimination of men's swimming was not in violation of Title IX because "men's participation in athletics was more than substantially proportionate to their enrollment, but women's participation was not" (Kelley, 1993, p. 242). The university's counsel had advised that a corresponding elimination of the women's swimming team "would put the university at risk of violating Title IX" (Kelley, 1994, p. 269). Additionally, the defendants argued men's swimming was an appropriate program to eliminate because of the relatively small spectator interest, the lack of high school programs, and the weak competitive history of the university's program.

Decision/rationale. The District Court acknowledged that this was the first case filed against an institution by men alleging violations of Title IX. The court then cited difficulties in resolving this case because of the restrictions placed on the "plain meaning of Title IX" (Kelley, 1993, p. 241) by the implementing regulations and the Policy Interpretation:

Quite frankly, these interpretations have converted Title IX from a statute which prohibits discrimination on the basis of sex (defined as the elimination of or exclusion from participation opportunities), into a statute which provides "equal opportunity for members of both sexes." (Kelley, 1993, p. 241)

The District Court continued by stating that equal opportunity does not necessarily require strict numerical proportionality, but can be accomplished



through full and effective accommodation of the underrepresented gender's interests and abilities or expansion of athletic programs for the underrepresented gender. In the case of the University of Illinois, expansion was not an alternative nor the objective, so its decision to move closer to proportionality by retaining the women's swimming team while eliminating the men's was, in the opinion of the Circuit Court, "extremely prudent" (Kelley, 1994, p. 269). The District Court cited another case which had established elimination of men's programs as a viable alternative used to reach proportionality. In Cohen v. Brown University (1993) the First Circuit Court of Appeals stated that an institution can reach proportionality "by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender" (Cohen, 1993, p. 899).

Both courts concurred that Title IX could not be violated by elimination of a men's program when men still maintained a proportional advantage in participation opportunities, even though individual men may be adversely affected. Conversely, elimination of a women's program would very likely violate Title IX because it would aggravate an already disproportionate representation of female athletes at the university. Therefore, the plaintiffs' Title IX claims were dismissed and the defendants' motion for summary judgment was granted and affirmed on appeal.

The plaintiffs' equal protection claims were also rejected by the courts. To be successful in an equal protection claim, the plaintiffs must

demonstrate that the government intentionally classified them and "similarly situated individuals for different treatment on the basis of an impermissible characteristic, such as race, national origin, or gender" (Kelley, 1993, p. 242). For a gender classification to be permissible, it must pass an intermediate standard of scrutiny which requires the classification to serve an important governmental objective and be substantially related to achieving that objective.

Both courts ruled that gender classifications were used to determine compliance with Title IX, the tool through which historical discrimination of women in athletics is eradicated. The Seventh Circuit Court addressed the question of whether providing a remedy for historical discrimination is, in fact, an important governmental objective by stating, "There is no doubt but that removing the legacy of sexual discrimination--including discrimination in the provision of extra-curricular offerings such as athletics--from our nation's educational institutions is an important governmental objective" (Kelley, 1994, p. 272). Therefore, the defendants' motion for summary judgment on the plaintiffs' equal protection claims, was granted and affirmed.

Suits by Employees

Clay v. The Board of  
Trustees of Neosho County  
Community College (1995)

Facts. John Clay was hired as the women's basketball coach at Neosho County Community College (NCCC) in Kansas on November 16, 1990. Throughout the 1992-1993 academic year, Clay allegedly "registered complaints about the inequities between the women's and men's sports programs at NCCC" (Clay, 1995, \*4) to NCCC Athletic Director Dr. Travis Kirkland as well as other officials at the college. On March 1, 1993, Kirkland informed Clay that he would recommend to the college's board of trustees that Clay's contract not be renewed for the 1993-1994 academic year. Kirkland then relieved Clay of all his responsibilities at the college, but continued to compensate Clay until the expiration of his current contract on June 17, 1993.

Clay filed suit against the Board of Trustees of NCCC and Kirkland alleging retaliatory discharge in violation of Title IX, a violation of his First Amendment Rights pursuant to Section 1983 of Title 42 of the United States Code, breach of contract, and wrongful discharge. The defendants filed a motion for summary judgment.

Arguments. Clay argued that Title IX provides "a private cause of action for damages for retaliation" (Clay, 1995, \*11) taken against an individual who brings Title IX violations to light. Clay also argued that his

constitutionally protected speech was the sole cause of his termination.

Clay's breach of contract and wrongful discharge claims were based on the Board's alleged failure to honor the nonrenewal procedures outlined in the NCCC policy handbook which were incorporated into Clay's 1992-1993 employment contract.

The defendants argued that Clay's Title IX claim was groundless because "Title IX does not provide a private cause of action for retaliation to a 'whistle blower' who is himself not discriminated against on the basis of sex" (Clay, 1995, \*8). They further argued that, even if Clay was able to establish a private cause of action, summary judgment in favor of the defendants would be mandated because Clay failed to exhaust all administrative remedies prior to filing suit. Kirkland also argued that his individual motion for summary judgment on Clay's Title IX claims should be granted because Title IX suits may only be filed against educational institutions, not individual employees of educational institutions.

Next, the defendants argued that Clay's Section 1983 claims should be dismissed because: (a) Clay's alleged protected speech was not a matter of public concern, (b) their interest in promoting the efficiency of their institution outweighed Clay's interest in making his comments, and (c) Clay's statements were not motivating factors in the Board of Trustee's decision to discharge him. Additionally, Kirkland argued that he was protected individually from this claim through qualified immunity.

Decision/rationale. The United States District Court for the District of Kansas noted that there was no mandatory precedent from which to follow in ruling on Clay's Title IX retaliation claim. Retaliation claims are clearly viable under Title VII of the Civil Rights Act of 1964 (Title VII) because language expressly prohibiting retaliation is contained in the statute. However, no such language exists in Title IX. Therefore the court had to interpret previous Title IX holdings regarding employment discrimination and extend their application to Clay's retaliation claim. In the majority opinion, Judge O'Connor wrote that although the court had "some misgivings about holding that Title IX authorizes, by implication, a private cause of action for retaliation" (Clay, 1995, \*13) it nonetheless found that "if employment discrimination on the basis of sex is covered by Title IX, so, too, should retaliation for speaking out regarding Title IX violations" (Clay, \*13). Accordingly, the court ruled that Clay was able to maintain a retaliation claim under Title IX and that unresolved factual disputes prohibited summary judgment in favor of the Board of Trustees. The court did, however, grant Kirkland's motion for summary judgment based on the fact that Title IX claims may only be brought against educational institutions.

The court then addressed Clay's Section 1983 claims. For Clay to prevail on a Section 1983 claim for First Amendment rights violations, he must first establish a prima facie case by demonstrating that (a) his statements dealt with a subject of public concern, (b) his First Amendment

interest in making the comments outweighed the "administrative interests" (Clay, 1995, \*26) of the college, and (c) there was a causal connection between his statements and the Board of Trustee's decision to terminate him. The court addressed each of these elements separately. First, the court stated that Clay's statements were not merely grievances about his employment situation but were in reaction to "discrimination against women by a public institution" (Clay, 1995, \*24) which is clearly a matter of public concern. The court next determined that Clay's First Amendment interest in making the statements outweighed the administrative interests of the college to maintain an efficient operation. The court noted that "'an employee's First Amendment interest is entitled to greater weight where he is acting as a whistle blower' in exposing government wrongdoing" (Clay, \*26). Lastly, the court found that questions remained as to whether Kirkland's recommendation that Clay not be retained was motivated by Clay's previous Title IX complaints. Although these questions may have precluded Clay from establishing a solid prima facie case, they also precluded summary judgment in favor of the defendants on Clay's Section 1983 claim.

The court also denied Kirkland's motion for summary judgment on Clay's Section 1983 claim against him in his individual capacity. As noted earlier, Kirkland maintained that he was protected from suit through qualified immunity. Qualified immunity "shields public officials performing discretionary functions from civil damages if their conduct does not violate clearly

established statutory or constitutional rights of which [a] reasonable person would have known" (Black, 1991, p. 516). The court found Kirkland's alleged retaliation against Clay because Clay exercised his First Amendment rights to be unreasonable and therefore not protected by qualified immunity.

The defendants' motion for summary judgment was granted with regard to Clay's breach of contract claim. Although the college failed to follow the nonrenewal procedures outlined in its policy handbook, these procedures were not expressly incorporated into Clay's contract. Therefore, the court found no breach of contract on the part of the defendants.

Finally, the court addressed Clay's wrongful discharge claims. The court ruled that Clay's wrongful discharge claims against the Board of Trustees and Kirkland in his official capacity were "preempted by Title IX as an adequate and exclusive remedy" (Clay, 1995, \*35) and entered a ruling of summary judgment. Summary judgment was denied to Kirkland in his individual capacity however. The court found questions of fact as to whether Kirkland's recommendation for Clay's nonrenewal was done so in a willful, wanton, or malicious manner.

Harker v. Utica College of  
Syracuse University (1995)

Facts. Phyllis Harker was hired by Utica College as the women's basketball and softball coach in 1990. Harker held a bachelor's degree and had nine years of basketball coaching experience at the Division III and junior college levels when she was hired by Utica College. Harker's basketball

coaching salary was \$25,000 for the 1990-91 academic year and had risen to \$29,916 for the 1992-93 academic year. The men's basketball coach at Utica College was Edwin Jones, who had been hired in 1987. At the time of his hiring, Jones had a master's degree and 14 years of college coaching experience, of which the last six had been at Utica. In 1987, Jones was hired at a salary of \$23,000 which had risen to \$32,500 by 1990.

In March, 1993, the athletic director at Utica, James Spartano, expressed his concern to Harker about Utica's prospects for fielding a women's basketball team for the 1993-94 season. Spartano's concerns rose from the fact that Utica had only one returning team member and that Harker had failed to recruit any new student-athletes. Spartano also expressed his dismay over complaints he had received from several of Harker's players regarding her coaching abilities. In April, Spartano notified Harker of his recommendation to the college president that her contract not be renewed for the 1993-94 academic year.

Harker met with the college president to discuss Spartano's nonrenewal recommendation and, during this meeting, allegedly complained about the inequities between Coach Jones' and her contracts. Not long after this meeting, the college president approved Spartano's recommendation not to renew Harker's contract and the plaintiff subsequently submitted her resignation. Harker then filed suit against the college, the president, and the



athletic director for alleged retaliatory discharge under Title VII, and gender discrimination under the Equal Pay Act and Title IX.

Arguments. Harker first claimed that the nonrenewal of her contract was a retaliatory action against her for complaints she made to the president regarding "the glaring inequities between herself as the only female coach and the other head coaches, all male" (Harker, 1995, p. 385). This retaliation, Harker argued, was in violation of Title VII. The defendants argued that Harker's nonrenewal was strictly a function of her poor recruiting and the extreme dissatisfaction with her coaching expressed by her players.

Harker's Equal Pay Act Claim rested on the fact that the men's basketball coach had been paid a substantially higher salary over the previous three years for a job that "required equal skill, effort, and responsibility and was performed under similar conditions" (Harker, 1995, p. 389). The defendants argued that Jones' salary was higher than Harker's because of differences in experience, education, and seniority at Utica College.

Harker listed five specific employment conditions in which she argued the defendants violated Title IX by discriminating against her: (a) she was required to raise money for team warm-ups; (b) women's softball utilized an off-campus facility as opposed to the men's on-campus baseball field; (c) unlike the male coaches, she was unable to conduct a summer camp; (d) men's teams had separate locker rooms, while women's teams shared

facilities with another team; and (e) no booster club support was distributed to her teams.

The defendants refuted each of Harker's Title IX claims. They argued that the college did, in fact, purchase warm-up suits for the men's basketball team as well as the women's basketball and soccer teams. They noted that the off-campus softball field was only 200 yards from the College Athletic Center, was maintained by the college, and was in far better condition than the men's baseball field. The defendants argued that Harker was never told she could not run her own summer camp. They pointed to the fact that there were two women's locker rooms and two men's locker rooms and that all four women's teams requested locker space while only two of the men's teams had done so. Lastly, the defendants produced vouchers revealing distribution of over \$7,000 in booster club funds to the women's basketball and softball teams.

Decision/rationale. The United States District Court for the Northern District of New York immediately dismissed Harker's Title VII retaliation claim against Spartano and granted him summary judgment on that count. The court noted that Spartano had informed the plaintiff that he would not recommend her for renewal prior to her making the statements for which she claimed she was retaliated against. Obviously Spartano could not be accused of retaliating against Harker for a statement not yet made.

Harker's Title VII retaliation claims were also dismissed against the president and the college. The court ruled that, after the plaintiff established a prima facie case of retaliation, the defendants responded with legitimate reasons for not renewing Harker's contract. Harker was unable to disprove these reasons, and therefore summary judgment was granted to the defendants on all Title VII claims.

The court addressed each of the defendants' reasons for the disparity in pay between the plaintiff and Jones before deciding on Harker's Equal Pay Act claim. The court first agreed with Harker that a master's degree is not enough justification for the salary differential in this case. The court also noted that there was a dispute over the amount and level of coaching experience the plaintiff possessed and how this compared to Jones' experience. The court left this dispute unresolved because the issue of seniority was clearly the controlling issue. The court stated that the Supreme Court has ruled that the Equal Pay Act does not prohibit an employer from rewarding seniority with higher wages. In 1990, when Harker was hired at Utica College, Jones had nine years of employment at the college. The court ruled that nine years seniority justified the salary disparity and granted the defendants summary judgment on Harker's Equal Pay Act claim.

Lastly, the court acknowledged that Harker's Title IX allegations were "sufficient to create an inference of discrimination" (Harker, 1995, p. 391) thus requiring the defendants to demonstrate nondiscriminatory justification

for their actions. The defendants' arguments, as stated above, were then deemed by the court to be "legitimate reasons for all of the terms and conditions of employment" (Harker, p. 392) which Harker claimed violated Title IX. Harker's Title IX claims were, therefore, dismissed and summary judgment granted for the defendants on all counts.

Meadows v. State University  
of New York at Oswego  
(1993/1995)

Facts. In the Fall of 1991, the former head of the Women's Health and Physical Education Department at the State University of New York at Oswego (SUNY Oswego) filed a Title IX complaint with the Office of Civil Rights claiming that the female students at Oswego were receiving an inferior athletic education than were the male students. The plaintiffs, two female staff members at Oswego, claimed that, after the filing of the complaint, they had been harassed and discriminated against because of the perception that they had been driving forces behind the complaint. Both plaintiffs subsequently filed their own complaints at which time, they alleged, the harassment intensified.

Plaintiff Meadows was a tenured professor who had been employed by the university for 22 years. As a tenured professor, Meadows' contract cannot be non-renewed, but the university suggested she accept the position as head women's basketball coach, a position she relinquished a few

years earlier because of a medical condition. Meadows had also lost her deanship position as well as unlimited access to certain athletic facilities.

Plaintiff Smouse was an untenured lecturer who had been employed by the university for eight years. Shortly after she filed her complaint, Smouse received a letter stating that her position would not be renewed after August 31, 1993.

The plaintiffs filed suit under Title IX and various civil rights statutes claiming that they had been retaliated against for exercising their First Amendment rights when they spoke out against inequities in physical education and athletic opportunities for male and female students. They sought injunctive relief under civil rights statutes enjoining the defendants from non-renewal of plaintiff Smouse's position. The motion for a preliminary injunction was heard by the United States District Court for the Northern District of New York in 1993, and the trial on the merits was held in 1995.

Arguments. The plaintiffs argued that the actions taken against them were clearly a retaliatory response to their actions which are protected under the First Amendment. Plaintiff Meadows argued that, in addition to being pressured to accept a position against the advice of her physician, the defendants retaliated against her by "attempting to 'drive a wedge between her and the male coaches'" (Meadows, 1993, p. 540). Plaintiff Smouse alleged that the Personnel Committee on Health, Physical Education and Athletics recommended that her contract be extended by three years in

June of 1992, but, after filing her complaint, she was notified in August of 1992 that her contract would not be renewed after August of 1993. Both plaintiffs argued that these actions taken by the university are attempts to silence them and others, and the threat of further retaliation will "'have a chilling effect on the exercise of First Amendment rights by plaintiffs and other employees of [SUNY Oswego]'" (Meadows, 1993, p. 541).

Decision/rationale. In resolving the motion for a preliminary injunction, the District Court asked two questions: (a) Will the plaintiffs suffer irreparable injury without injunctive relief? and (b) What is the likelihood of success on the merits of the case for the plaintiffs?

In addressing the issue of irreparable harm, the District Court clearly ruled that financial losses alone do not constitute irreparable harm and, therefore, the plaintiffs were required to demonstrate additional harm. The plaintiffs responded by arguing that the "chilling effect" (Meadows, 1993, p. 539) on free speech resulting from the defendants' retaliatory actions will, in fact, cause irreparable harm to them and other faculty members. Citing precedent, the District Court ruled that the chilling effect was not a result of actions of the defendants which could be remedied by an injunction (namely non-renewal of plaintiff Smouse's contract), but rather a result of the threat of retaliatory action. In rejecting the plaintiffs' claims of irreparable harm, the court stated:

The court cannot escape the conclusion that a preliminary injunction would do nothing to abate the chilling effect alleged, since if Ms. Smouse is presently "chilled" from asserting her First Amendment rights, the court can only deduce that an interim injunction would not thaw this "chill," as the threat of permanent discharge would still remain.

(Meadows, 1993, p. 542)

The plaintiffs further contended that the source of the "chill" and irreparable harm lay not only in Smouse's non-renewal, but in Meadows' treatment as well. The court also rejected this claim as it determined that Meadows was no longer in danger of having to assume head coaching duties. The court went on to state that even if Meadows was pressured to accept the coaching position, this would not constitute irreparable harm. Furthermore, the court failed to understand how enjoining the university from non-renewal of Smouse's contract (as requested in the motion for injunctive relief) would eliminate the alleged harassment and discrimination of Meadows.

Although the court acknowledged "an intolerable atmosphere for an educational institution" (Meadows, 1993, p. 540), it ruled that the plaintiffs failed to establish irreparable harm to their First Amendment rights by the actions of the defendants. Because irreparable harm was not established, the District Court did not address the second question used to evaluate a request for a preliminary injunction and the plaintiffs' motion was denied.

In the trial on the merits in 1995, the Title IX claims and many of the civil rights claims were dismissed as being duplicative of some of the remaining civil rights claims. The trial ended with a jury ruling in favor of the defendants on all charges except one. On plaintiff Smouse's charge of retaliation under Title VII, the jury found the university to be liable. However, the jury found the university's president, a co-defendant who actually decided not to renew Smouse's contract, not liable under Title VII. The District Court found these two rulings to be inconsistent and could not reconcile them. Therefore, a new trial was ordered for plaintiff Smouse's Title VII retaliation claims only.

Deli v. University of  
Minnesota (1994a)

Facts. Katalin Deli was the varsity women's gymnastics coach at the University of Minnesota when the university terminated her employment for just cause in 1992. On October 12, 1993, Deli filed suit against the university claiming that she was discriminated against by being paid a smaller salary than coaches of several of the men's teams.

Deli filed this claim stating that the university's action constituted gender discrimination prohibited by Title VII, the Equal Pay Act, and Title IX. The defendant university filed a motion for summary judgment and dismissal of all of the plaintiff's claims.

Arguments. Deli argued that the disparity in compensation the university paid the coaches of men's teams and what they paid her was based on



the fact that she coached women athletes. In her complaint, Deli did not assert that the discrimination was based on her gender, but rather, solely on the gender of the athletes she coached. The plaintiff did not contest the legality of her employment termination in this proceeding.

The University of Minnesota argued that it was entitled to summary judgment as a matter of law. This was because there was no dispute over the material facts in this case, and that the plaintiff's claims were not legally valid.

Decision/rationale. The District Court addressed each of Deli's statutory claims separately. First, the court rejected Deli's Title VII claims because the statute clearly states that discriminating against an individual based on that individual's gender is prohibited. It does not, however, prohibit "salary discrimination based on the sex of other persons over whom the employee has supervision or oversight responsibilities" (Deli, 1994a, p. 960). Because Deli's claims were based on the gender of her team and not her own gender, the court failed to recognize a valid Title VII claim.

Deli's Equal Pay Act claims were also rejected by the court. The Equal Pay Act allows pay differentials to exist if they are based on a "factor other than sex" (Deli, 1994a, p. 960) of the claimant. Once again, because Deli claimed the discrimination was based on the gender of her athletes, that was considered a factor other than sex of the plaintiff and not prohibited by the Equal Pay Act. The court went on to note that, even if Deli had filed an

Equal Pay Act claim based on her gender, she would not have succeeded.

Citing Stanley v. University of Southern California (1994), the District Court stated that the Equal Pay Act allows pay differentials "to coaches of different genders if the coaching positions are not substantially equal in terms of skill, effort, responsibility, and working conditions" (Deli, 1994a, p. 961).

To prevail, Deli would have had to demonstrate that her position was "substantially equal" (Deli, 1994a, p. 961) to those positions for which she compared salaries. In this case, Deli compared her compensation with the men's football, basketball, and hockey coaches. The court noted that Deli's position was clearly not substantially equal with the men's coaches she used as comparisons in terms of responsibility and working conditions.

Lastly, the District Court rejected Deli's claims under Title IX as well. First, the court ruled that the plaintiff's claim for Title IX compensation was untimely as it was filed beyond the statute of limitations. Because Title IX has no expressed statute of limitations, courts are compelled to apply the "'most closely analogous' statute of limitations provided under state law" (Deli, 1994a, p. 962). In this case, the court deemed the Minnesota Human Rights Act as the state statute most analogous to Title IX in both intent and language. The one-year limitation period prescribed in the Minnesota Human Rights Act was therefore applied to this case, rendering it untimely. Because Deli received her last paycheck from the university in June, 1992, that was the last date the alleged discrimination could have occurred. Deli

did not, however, file this complaint until October 12, 1993, well beyond the one-year limit.

The court also stated that Deli's Title IX claim would have failed on its merits even if it was filed within the time limitations. The Title IX Policy Interpretation (1979) clearly states that disparities in coaches' compensation violates Title IX only if it denies male and female athletes an equivalent quality of coaching. This was not apparent in this case as the plaintiff not only failed to claim inferior coaching as a result of the pay inequities, but actually contended that she provided her athletes superior coaching as evidenced by her athletes' accomplishments and her coaching awards. Title IX addresses pay issues only as they relate to the opportunities provided student-athletes as a result of them, not as an end in themselves.

The District Court for the District of Minnesota ruled that the plaintiff's claims were not valid, and there was no genuine dispute over the material facts in this case. Therefore, the University of Minnesota's motion for summary judgment was granted and Deli's complaints were dismissed.

Broussard v. Board of  
Trustees for State Colleges  
and Universities (1993)

Facts. Plaintiff Broussard, a female, was employed by the Southeastern Louisiana University Athletic department as a store manager responsible for concessions and ticket sales. On December 21, 1990, Broussard was advised that her position was to be eliminated due to budgetary constraints

and her responsibilities would be assumed by university students. She was offered a clerk position, maintaining her current compensation, which she accepted.

On June 27, 1991, Broussard learned that a male "Assistant to the Athletic Director" (Broussard, 1993, \*2) was hired by the department. Broussard claimed that this new position's duties and responsibilities were comparable to the ones she possessed at her previous position before its elimination. Broussard filed suit against the Board of Trustees of the University seeking reinstatement as well as declaratory and compensatory relief. The plaintiff claimed that the hiring of a male to assume her former responsibilities was a violation of Title IX, Sections 1981 and 1983 of Title 42 of the United States Code, and the Equal Protection Clause of the Fourteenth Amendment.

The defendants filed a motion to dismiss the plaintiff's claims for her "failure to state a claim upon which relief can be granted" (Broussard, 1993, \*1). This case was in response to the defendants' motion for dismissal; it was not a trial on the merits of the claim.

Arguments. The defendants argued that sovereign immunity granted to the states and their agents by the Eleventh Amendment, which has been interpreted to bar actions against a state by citizens of that state, prevented the Board of Trustees from being sued without its consent. Therefore, the

defendants argued that the plaintiff is entitled to no relief under the claims stated.

Decision/rationale. The United States District Court for the Eastern District of Louisiana determined the central issue of this motion regarding Title IX to be "whether Title IX provides a remedy for employment discrimination" (Broussard, 1993, \*4). The defendants, citing Storey v. Board of Regents of the University of Wisconsin System (1985), claimed that recovery of damages by private litigants is disallowed under Title IX. The District Court rejected this argument pointing to the fact that the Storey decision had since been nullified by Congress and the Supreme Court. The Civil Rights Remedies Equalization Amendment of 1986 expressly states that a state shall not be granted Eleventh Amendment immunity for Title IX violations and that remedies available to plaintiffs who bring actions against entities other than the state will also be available to those who file claims against the state. The Supreme Court clarified this amendment by awarding damages to a Title IX plaintiff in Franklin v. Gwinnett County Public Schools (1992).

The District Court determined that Broussard did, in fact, have an appreciable Title IX claim of employment discrimination. The court further noted that the plaintiff's failure to correctly categorize her complaint under the proper legal theory does not negate her claim as long as the alleged

facts form a basis upon which relief can be granted. Therefore, the District Court denied the defendants' motion to dismiss.

Paddio v. Board of  
Trustees for State Colleges  
and Universities (1993)

Facts. Plaintiff Paddio, a female, was terminated as the varsity softball and volleyball coach at Southeastern Louisiana University. Paddio claimed the termination was a result of her race and gender and filed suit under Title IX, Section 1983 of Title 42 of the United States Code for deprivation of rights, and the First and Fourteenth Amendments seeking compensatory and punitive relief.

The defendants filed this motion to dismiss Paddio's claims. Paddio agreed to dismiss the civil rights claims against the Board of Trustees and the individual defendants in their official capacities. The plaintiff's civil rights claims against the defendants in their personal capacities and her Title IX claims remained viable.

Arguments. The defendants, citing Storey v. Board of Regents of the University of Wisconsin System (1985), argued that Title IX, while prohibiting employment discrimination, "does not provide a direct remedy for employment discrimination" (Paddio, 1993, \*3). The defendants argued that the plaintiff's Title IX claims should, therefore, be dismissed.

Decision/rationale. In citing Franklin v. Gwinnett County Public Schools (1992), the United States District Court for the Eastern District of Louisiana

noted that the United States Supreme Court determined monetary damages to be an appropriate remedy for Title IX violations. Although the Franklin case did not address an employment issue, the District Court did "not find this distinction significant" (Paddio, 1993, \*4). The court stated this was because the Franklin court, as well as other courts citing the Franklin opinion, "make no distinction between employment and nonemployment matters" (Paddio, \*4). Therefore, the District Court determined that the plaintiff's attempt to recover compensatory damages under Title IX was appropriate and the defendants' motion to dismiss Paddio's Title IX claims was denied.

## CHAPTER V

### ANALYSIS OF CONTRACT LITIGATION

#### Suits by Employees

##### Tolis v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College (1992/1994a/1994b/ 1995a/1995b)

Facts. Arthur Tolis was employed as head basketball coach at the University of New Orleans (UNO) when he was terminated on March 21, 1988. Tolis and the Board of Supervisors then entered into negotiations to settle a termination agreement addressing the remaining two years on Tolis' contract. The parties agreed on a written compromise agreement which prohibited either party from disclosing the terms of the agreement. Additionally, the parties entered into an oral agreement requiring UNO to pay Tolis two installments of \$58,000. The first payment was made to Tolis immediately after signing the compromise agreement with the second installment due on April 21, 1989. When UNO was delinquent on the second payment, Tolis and his wife filed suit in federal and state courts seeking damages for breach of the verbal contract and fraud. The defendants filed



motions for summary judgments in both courts and a long, complicated legal battle was begun.

Arguments. The early stages of this case dealt mainly with the dispute over the admissibility of the oral agreement. The defendants argued that the parol evidence rule prohibited the plaintiffs' use of the oral agreement to alter the content of the written compromise agreement. UNO agreed that they owed Tolis an additional \$58,000, but contested other promises Tolis alleged were made in the oral agreement. The plaintiffs argued that a tape recording of the negotiations they conducted with the defendants was admissible because it shed light on "exactly what matters were intended to be settled by the compromise agreement" (Condoll v. Johns-Manville Sales Corporation, 1984, p. 172).

The latter stages of this case dealt exclusively with legal procedures. The defendants argued that a judgment entered on March 29, 1994 by the Fourth Circuit Court of Appeal of Louisiana dismissing the case with prejudice was a final judgment. The plaintiffs maintained that the trial court's oral decision on December 10, 1993 granting them partial summary judgment was binding even though it wasn't signed until May 2, 1994.

Decision/rationale. On May 16, 1995, the appellate court amended its 1994 decision dismissing the case, affirmed the trial court's granting of partial summary judgment for the plaintiffs, and remanded the case back to

trial court to determine damages. The defendants petitioned the Supreme Court of Louisiana and an application for writ of certiorari was granted.

The Supreme Court of Louisiana ruled that the appellate court's 1994 decision was a final decision because it was decided on the merits of the case. Because the appellate court dismissed the case with prejudice it "barred subsequent modification by the court of appeal or by any other court except on direct review" (Tolis, 1995b, \*5). Therefore, the Supreme Court of Louisiana reversed the appellate court's 1995 decision and dismissed the case.

Maddox v. University of  
Tennessee (1995)

Facts. On February 17, 1992, Robert Maddox was offered a non-tenured position as assistant football coach at the University of Tennessee. During the application process, Maddox completed a questionnaire where he stated that he had no health problems nor had he ever been arrested for a criminal offense. On May 26, 1992, Maddox was arrested for driving under the influence after he "backed his car across a major public road at a high rate of speed, almost striking another vehicle" (Maddox, 1995, p. 845). Maddox was combative to the arresting officer, his clothes were disheveled, he refused to submit to a breathalyzer test, and he claimed he was unemployed. The incident was widely publicized and a source of great embarrassment to the university. Maddox admitted to being an alcoholic and entered a rehabilitation program. It was further discovered that Maddox had

been arrested twice previously for drunk driving as well as once for possession of a controlled substance.

In June 1992, the university's acting athletic director and head football coach determined that Maddox could no longer serve effectively on the coaching staff and notified Maddox that his employment was terminated. Maddox filed suit against the university, its trustees, and the acting athletic director claiming his dismissal was a result of his alcoholism and, as such, discriminatory. Maddox claimed this discrimination was a violation of his rights under the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 (ADA). The defendants claimed Maddox's alcoholism was not the reason for his termination and filed a motion for summary judgment. The district court granted the defendants' motion for summary judgment and Maddox appealed.

Arguments. The defendants maintained that they were unaware of Maddox's alcohol problem prior to his arrest and that his alcoholism played no part in their decision to dismiss him. They cited three reasons that made Maddox's termination necessary: (a) his criminal activity and misconduct, (b) the negative publicity generated by the incident, and (c) Maddox was deemed to be no longer qualified to handle coaching responsibilities.

Maddox argued that the sole reason for his dismissal was his alcoholism and any attempt to separate his conduct from his disability is flawed. He maintained that his criminal activity and misconduct were "causally

connected manifestation[s] of the disability of alcoholism" (Maddox, 1995, p. 846). Therefore, Maddox contended that even if the defendants had based their termination decision solely on his conduct, in reality that decision was based on his alcoholism because his conduct and his disability were inseparable.

Maddox finally argued that the university's contention that he was no longer qualified to coach was without merit. Maddox argued that his behavior did not affect the performance of his coaching duties. As an assistant coach, Maddox maintained his only responsibilities were on the football field where he never displayed any type of misconduct.

Decision/rationale. For Maddox to successfully state a claim under the Rehabilitation Act of 1973, the United States Court of Appeals for the Sixth Circuit stated that he would have to demonstrate that he was "otherwise qualified" (Maddox, 1995, p. 846) to perform the duties from which he was terminated, and that he was terminated solely by reason of his alcoholism. The court found that Maddox was unable to demonstrate either, and affirmed the district court's grant of summary judgment for the defendants.

First, the court stated that Maddox's argument that he was still qualified to coach because only on-field responsibilities were relevant "simply ignores reality" (Maddox, 1995, p. 849). The court contended that coaches are clearly representatives of the team and the university as well as mentors

and role models to their athletes. Because of the discredit Maddox brought on the university, he was no longer qualified to serve on its staff.

Next, the court highlighted the distinction between actions taken as a result of misconduct and actions taken as a result of a disability. If this distinction were not allowed, employers "would be forced to accommodate all behavior of an alcoholic which could in any way be related to the alcoholic's use of intoxicating beverages" (Maddox, 1995, p. 847). Both the Rehabilitation Act and the ADA allow employers to hold alcoholics to certain minimum performance standards, below which they cannot fall. The court ruled that Maddox's conduct clearly fell below minimum acceptable standards and the defendants were well within their rights to terminate him accordingly.

Dambrot v. Central Michigan University (1993/1995)

Facts. Keith Dambrot became the head basketball coach at Central Michigan University (CMU) in May 1991. During the 1992-93 season, Dambrot, a Caucasian, used a racial epithet while addressing his players on at least two occasions. Dambrot maintained that he used the term in a "positive and reinforcing" (Dambrot, 1995, p. 1180) fashion, and the African-American players on the team confirmed that they had not been offended by its use. Nevertheless, the university's affirmative action officer found that Dambrot's use of the epithet violated the university's discriminatory harassment policy. Dambrot was subsequently suspended without pay

for five days and later informed that the university would not renew his contract for the 1993-94 season.

Dambrot filed suit alleging he was not retained at CMU because he used a racial epithet and this action by the university violated his First Amendment right to free speech. Nine members of the CMU basketball team joined Dambrot's lawsuit claiming that the university's discriminatory harassment policy violated their First Amendment rights because it was overbroad and vague. The United States District Court for the Eastern District of Michigan entered summary judgment in favor of CMU on Dambrot's claim of wrongful termination, and in favor of the student plaintiffs regarding their claim that the university's discriminatory harassment policy was unconstitutional. Dambrot appealed this decision, and CMU cross-appealed.

Arguments. CMU argued that its discriminatory harassment policy posed no "realistic danger" (Dambrot, 1995, p. 1182) of imposing on anyone's First Amendment rights because the university is sensitive to constitutionally protected speech when enforcing the policy. Additionally, CMU stated that the policy clearly prevents application of its principles to the extent that they interfere with First Amendment rights.

Dambrot argued that he was wrongfully terminated based solely on his use of the racial epithet. He maintained that his use of the word was in an educational context and constitutionally protected. Therefore, CMU violated

the First Amendment when they terminated his employment because of its use.

Decision/rationale. The United States Court of Appeals for the Sixth Circuit first examined if the District Court correctly ruled that CMU's discriminatory harassment policy was unconstitutional. To determine if the policy was overbroad and vague the court utilized a two-step approach. First, the court determined if the policy was so broad as to affect a considerable amount of constitutionally protected discourse and produce a chilling effect on "the exercise of free speech and expression" (Dambrot, 1995, p. 1182). The court ruled that CMU's policy was, in fact, so broad that it could realistically endanger the expression of free speech at the university.

The second step the court utilized was to determine if the policy clearly defined standards of prohibited expression or if it left that to the discretion of the university officials enforcing the policy. The Court of Appeals agreed with the District Court that CMU's policy did not provide fair notice of prohibited standards of conduct and completely delegated subjective enforcement of the policy to university officials. The court similarly rejected CMU's argument that the policy simply limited "fighting words" (Dambrot, 1995, p. 1184). The District Court stated that, even if this were the case, it would be unconstitutional because the policy acts as "viewpoint discrimination" (Dambrot, 1993, p. 483) by allowing positive racial comments but prohibiting negative racial comments.

Because CMU's discriminatory harassment policy was ruled overbroad and vague, the Court of Appeals affirmed the District Courts ruling that it was unconstitutional. In the words of District Judge Cleland, "The expanse of the suppression of speech made possible by this CMU policy is as remarkable as it is illegal" (Dambrot, 1993, p. 484).

The court then examined Dambrot's claims that he was wrongfully terminated in violation of his First Amendment rights. In order for Dambrot to prevail on this claim, he would have to prove that he was punished under CMU's policy for exercising a protected right. To prove that his use of the racial epithet was a protected right, Dambrot had to demonstrate that his comment was on a matter of public concern. If he could demonstrate that it was regarding a matter of public concern, the court would then determine if his right to free speech outweighed the government's interest in suppressing it. Lastly, the court would determine if the plaintiff's constitutionally protected speech was "a substantial or motivating factor in the termination" (Dambrot, 1995, p. 1186).

The court found that Dambrot's use of the epithet was for motivational reasons only, and not essential to the message of increasing his players' aggressiveness which he was trying to convey. Furthermore, the message Dambrot was trying to convey to his players was not found by the court to be one of public concern nor one advancing an academic message. The court also noted that the word was used in the team's locker room and



intended for the player's consumption only. These factors led the court to determine that Dambrot's comments were for private interests and, therefore, not necessarily protected by the First Amendment. The First Amendment protects one's right to express viewpoints in terms which may be offensive to others, but it does not require an employer to accept or tolerate one's offensive private statements. The court ruled that CMU was well within its rights to disapprove of the use of racial epithets by its coaches to motivate its student-athletes.

Because Dambrot's use of the epithet was not done so while addressing a matter of public concern, there was no need for the court to examine whether his use of the term was a "substantial or motivating factor" (Dambrot, 1995, p. 1186) in his termination. Therefore, even though CMU's discriminatory harassment policy was found to be unconstitutional, the university's termination of Dambrot did not violate any of his constitutional rights because his speech was not constitutionally protected. The Court of Appeals affirmed the District Court's rulings.

Stanley v. University of Southern California (1994/1995)

Facts. Marianne Stanley signed a four-year contract as head women's basketball coach at the University of Southern California (USC) in the Summer of 1989. Stanley's annual base salary was agreed to begin at \$60,000 with her total compensation reaching \$69,993 in 1993. In April 1993, USC Athletic Director Michael Garrett began negotiating a new contract with

Stanley, hoping to forge an agreement prior to the expiration of Stanley's current contract on June 30, 1993. Stanley demanded a contract identical to the men's head basketball coach, George Raveling. Garrett refused Stanley's demand and offered her a three-year deal with annual compensation of \$86,000, \$96,000, and \$106,000. Stanley refused to accept Garrett's offer, characterizing it as "an insult" (Stanley, 1995, \*7).

After further unsuccessful discussions with Garrett, Stanley retained an attorney to represent her in ensuing negotiations. Stanley's attorney presented Garrett with a three-year proposal with substantially greater salaries than Garrett had offered as well as an elaborate incentive package. Garrett rejected this counter-offer and then withdrew his original offer. On June 21, 1993, Garrett presented his final offer to Stanley which was a one-year deal making her the second highest paid women's basketball coach in their conference. Stanley did not respond to this offer. On July 15, 1993, Garrett informed Stanley that all previous offers had been withdrawn and, in light of the fact that her previous contract had expired on June 30, she was to refrain from further service on behalf of USC.

On August 5, 1993, Stanley filed suit against USC and Garrett alleging gender discrimination and retaliatory discharge. On August 6, the Superior Court for the County of Los Angeles granted Stanley's request for a temporary restraining order reinstating her as USC's coach. The defendants removed the case to the Federal District Court for the Central District of

California which denied Stanley's motion for a preliminary injunction. This ruling was affirmed by the United States Court of Appeals for the Ninth Circuit. Stanley then filed an amended complaint to the District Court stating the following claims: (a) employment discrimination under the Equal Pay Act, Title IX, and the California Fair Employment and Housing Act; (b) Title VII retaliation; (c) wrongful discharge; (d) breach of implied-in-fact employment contract; (e) breach of express contract; and (f) breach of the implied covenant of good faith and fair dealing.

Arguments. Each of Stanley's employment discrimination charges were based on the fact that Stanley received less employment compensation and benefits than her male colleague. Stanley argued "that USC maintained a policy or practice of paying women disparate wages and benefits as compared to male employees who perform equal work" (Stanley, 1995, \*14). Stanley maintained that the disparity in compensation was strictly a product of gender discrimination which is prohibited by State of California and Federal statutes.

Additionally, Stanley argued that USC violated Title VII of the Civil Rights Act of 1964 by terminating her for engaging in a "protected activity" (Stanley, 1995, \*26). Stanley maintained that her discharge was clearly done in retaliation to her demands of equal pay and subsequent filing of a complaint and lawsuit. In Stanley's claim of wrongful discharge in violation of public policy, she argued that the defendants terminated her based on the

fact that she complained about gender discrimination at USC and demanded equal compensation.

Stanley alleged three contract causes of action as well. Stanley maintained that Garrett had agreed with her that "she and Coach Raveling performed substantially equal work and should be paid equally" (Stanley, 1995, \*33), but that the university did not have the funds to do so at the time of that meeting. Stanley argued that this discussion constituted an express employment contract which was part written and part oral. Stanley next maintained that USC officials had expressed to her the fact that if she created a successful program "she would be awarded a multi-year contract with 'equal pay for equal work'" (Stanley, \*35). The plaintiff argued that, because she developed a winning program, a multi-year implied-in-fact contract was created and then breached by USC. Lastly, Stanley claimed USC breached the covenant of good faith and fair dealing by paying her less over the four-year period of her original contract than they paid Raveling, and by failing to negotiate her new contract in good faith. She further argued that the defendants acted in bad faith by failing to acknowledge and execute the alleged oral agreement between Stanley and Garrett in which it was agreed that she be compensated equally to Raveling.

Decision/rationale. The central issue in this case was clearly the alleged employment discrimination based on gender. Stanley's claims of disparate pay for equal work would be supported if she could demonstrate that her

job was substantially equal to Raveling's and that the disparity in compensation was based solely on gender. The District Court ruled that she was unsuccessful in proving either. To the contrary, the court determined that Stanley's job was clearly not equivalent to Raveling's in scope or responsibility. Unlike Stanley, Coach Raveling was faced with intense pressure to produce a successful team, make numerous public appearances, and generate revenue for the department. During the four years that Stanley was head coach, the men's program generated revenue "90 times greater than the revenue generated by the women's basketball team" (Stanley, 1994, p. 1321). Additionally, the average attendance at men's games was 4,103, while the average attendance at women's games was 762. Raveling's contract also required him to participate "in at least twelve outside speaking engagements per year, that he be accessible to the media for interviews, and that he participate in community activities" (Stanley, 1995, \*20). Stanley's contract contained no such provisions.

While the "quantitative dissimilarity" (Stanley, 1994, p. 1321) in Stanley's and Raveling's promotional and fund-raising responsibilities were ruled as justification for compensation disparities, rewarding "professional experience and education" (Stanley, 1995, \*23) is also allowed under the Equal Pay Act. The court ruled that Raveling's professional experience was clearly superior to Stanley's. Stanley had 17 years coaching experience while Raveling had coached for over 31 years and had been at USC for

three years prior to Stanley's arrival. Raveling also had extensive experience in the marketing and promotional field and was an accomplished author and speaker. Stanley's marketing experience was limited to her coaching career.

While acknowledging that Raveling's "public recognition exceeded her own" (Stanley, 1995, \*24) and that the men's program enjoyed greater popularity than the women's, Stanley blamed USC's promotional efforts, the media, and "societal discrimination" (Stanley, 1994, p. 1323) for these disparities. The court found no significant evidence to support Stanley's accusation that USC failed to adequately promote the women's basketball program. The court also ruled that the defendants cannot be held responsible for society's greater interest in viewing nor the media's greater interest in covering men's athletics as compared to women's athletics.

The District Court ruled that Stanley had failed to demonstrate that the USC women's and men's basketball coaches' jobs were substantially equal or that existing pay disparities were based on anything other than nondiscriminatory factors. Therefore, the court ruled that the defendants were entitled to summary judgment on all the plaintiff's employment discrimination claims.

The District Court also found that the defendants were entitled to summary judgment on Stanley's claims of Title VII retaliation and wrongful discharge. The court ruled that Stanley failed to demonstrate retaliation on

the part of the defendants, or that she had been constructively or expressly discharged. The court determined that Stanley was not discharged, but rather, failed to accept a reasonable employment offer before her original contract expired.

Lastly, Stanley's contract and covenant claims were addressed by the court. The court ruled that Stanley and Garrett had never entered into an express contract. Even if they had discussed Stanley's compensation as compared to Raveling's, no evidence supports Stanley's claim that Garrett agreed to compensate her equally to Raveling. To the contrary, the court noted that this claim contradicts many of the previous statements made by Stanley and her attorney expressing their interest in drafting a new contract. The court also rejected Stanley's argument that an implied-in-fact contract existed. It was clearly stated in Stanley's written contract that no other agreements of any kind would carry any "force or effect" (Stanley, 1995, \*38) unless incorporated into her written contract. Lastly, the court found that the defendants dealt in good faith with Stanley under her original contract and in attempting to negotiate a new contract. USC offered Stanley a new contract with a significant salary increase, and had obligation to extend Stanley's employment when she refused their offer and allowed her original contract to expire. As a result, the court determined that the defendants were entitled to summary judgment on all of Stanley's contract and covenant claims.

Stanley failed to demonstrate to the court that there were any genuine issues of material fact in this case, and the court determined that the defendants were entitled to judgment on each of the plaintiff's claims. Therefore, the defendants' motion for summary judgment was granted.

Rodriguez v. Board of Trustees  
for State Colleges and  
Universities (1993/1994)

Facts. Richard Rodriguez had been a student assistant coach of the female softball team at Southeastern University of Louisiana for the 1991-92 academic year. Prior to the 1992-93 academic year, head softball coach Jacqueline Paddio forwarded a request to athletic director Thomas Douple, to retain Rodriguez as a student assistant coach for the upcoming season. In June 1992, Paddio's contract was not renewed by the defendant university and her request to retain Rodriguez was left unanswered. Rodriguez then contacted Douple to inquire about his position and was informed that the decision to employ student assistant coaches would be left entirely to Paddio's replacement. Douple encouraged Rodriguez to contact Paddio's successor and express his interest in the job. Rodriguez failed to contact the new coach and filed suit against the Board of Trustees and various university officials on July 21, 1992. In his complaint, Rodriguez claimed the defendants violated Section 1983 of Title 42 of the United States Code, the First and Fourteenth Amendments of the United States Constitution, and



various Louisiana state statutes by denying him employment based on his association with Paddio.

On November 1, 1993, The United States District Court for the Eastern District of Louisiana dismissed the plaintiff's claims against the Board of Trustees on the grounds of governmental immunity. Subsequently, the remaining defendants filed a motion for summary judgment on the plaintiff's claims.

Arguments. Rodriguez argued that the university's failure to continue his employment was done so in violation of his intrinsic freedom of association which is protected under the Due Process Clause of the Fourteenth Amendment. Rodriguez claimed the sole reason he was not offered continued employment was because of his close association with Paddio.

Douple maintained that he was unaware of the plaintiff's association with Paddio, and even if he had been, he would have taken no adverse action against Rodriguez. Additionally, Douple stated that the reason he did not continue Rodriguez's employment was because personnel decisions were issues that were "within the exclusive province of Paddio's successor" (Rodriguez, 1994, \*15).

Decision/rationale. For employees to successfully claim a violation of their rights to association, they must first prove that the association was constitutionally protected, and that the association "was a substantial or

motivating factor behind the adverse employment action" (Rodriguez, 1994, \*6). The District Court ruled that Rodriguez was able to prove neither.

First, Rodriguez could not demonstrate that his relationship with Paddio qualified "as one worthy of constitutional protection" (Rodriguez, 1994, \*12). The United States Supreme Court has stated that protected associations, such as family relationships, entail "deep attachments and commitments" (Roberts v. United States Jaycees, 1984) which were not present in Rodriguez's relationship with Paddio. Next, the court noted that the plaintiff's relationship with Paddio was unknown to Douple who, in fact, encouraged Rodriguez to inquire with the new coach about a position. Clearly, this establishes the fact that Rodriguez's association with Paddio was neither a significant nor motivating factor in Douple's failure to continue the plaintiff's employment.

Finally, the court addressed the plaintiff's state law claims. Because Rodriguez voluntarily left the university prior to contacting the new coach, the court ruled that no adverse employment action was taken by the defendants. Additionally, the court found that Rodriguez was an at-will employee of the university whose employment had expired. The university had no obligation to extend Rodriguez an additional contract. Based on the reasons cited in the above discussion, the court dismissed all claims against the defendants.

University of Nevada  
v. Tarkanian (1994)

Facts. In 1977, the National Collegiate Athletic Association (NCAA) conducted an extensive investigation of the basketball program at the University of Nevada, Las Vegas (UNLV). Upon conclusion of the investigation, the NCAA reported that UNLV's basketball coach, Jerry Tarkanian, had committed numerous NCAA rules violations. The NCAA imposed sanctions on UNLV and recommended that UNLV suspend Tarkanian from coaching duties or be subject to further sanctions. UNLV agreed to suspend Tarkanian who immediately sued the NCAA and UNLV for deprivation of his property and liberty interests without due process as required by the Fourteenth Amendment of the United States Constitution.

In what were but two stops in a lengthy appellate history, a Nevada district court ruled in favor of Tarkanian on his claims against the NCAA and UNLV and awarded Tarkanian legal costs and attorney's fees. The district court then apportioned Tarkanian's legal costs and attorney's fees as follows: (a) 90% of the costs (\$176,356.73) were to be paid by the NCAA, and (b) 10% of the costs (\$19,595.19) were to be paid by UNLV. After another series of appeals, this case reached the United States Supreme Court which ruled that the NCAA could not be held liable for its actions because it was not a state actor. In 1988, The Supreme Court found that UNLV's suspension of Tarkanian "was the state action that created liability" (University of Nevada, 1994, p. 1184). Therefore, all rulings against the

NCAA were vacated and the case was remanded back to the Nevada court system. In 1992, a Nevada district court found that Tarkanian, as a prevailing civil rights plaintiff, was entitled to \$150,725.58 in legal costs and attorney's fees from the lone defendant, UNLV. UNLV subsequently appealed this decision to the Supreme Court of Nevada.

Arguments. UNLV argued that the district court's ruling imposing Tarkanian's attorney's fees upon them was flawed in three ways. First, UNLV argued that the court abused its discretion by imposing 100% of the attorney's fees upon them when the original court order imposed only 10%. UNLV maintained that they should not be required to pay full costs for a defendant who prevailed against only one out of several originally named defendants. In paying full costs, UNLV argued that they would be paying for fees Tarkanian incurred while litigating unsuccessfully against the NCAA. Secondly, UNLV argued that the original ruling holding UNLV responsible for only 10% of Tarkanian's fees "became a final judgment" (University of Nevada, 1994, p. 1186) because the university did not appeal. Lastly, UNLV argued that neither the Supreme Court of Nevada nor the United States Supreme Court acquired jurisdiction to modify the district court's original apportionment of costs.

Decision/rationale. The Supreme Court of Nevada rejected UNLV's argument that the district court abused its discretion by requiring them to pay 100% of Tarkanian's costs. The district court originally imposed joint

and several liability against the NCAA and UNLV. Joint and several liability applies when "two or more defendants combine to cause a single, indivisible injury" (University of Nevada, 1994, p. 1187) and it holds "each defendant liable for the entire amount of judgment" (University of Nevada, p. 1187). Therefore, once the NCAA was relieved of liability, UNLV became responsible for the entire award. UNLV's "limited success" (University of Nevada, p. 1189) argument was also rejected because the courts had already subtracted Tarkanian's costs in unsuccessfully defending against the NCAA's appeal.

The Nevada Supreme Court similarly rejected UNLV's argument that the original apportionment of legal fees was, by law, a final judgment. UNLV attempted to apply the doctrine of res judicata which precludes a party "from relitigating a cause of action or an issue which has been finally determined by a court of competent jurisdiction" (University of Nevada, 1994, p. 1191). The court ruled that this doctrine would be applicable only if the issue of UNLV's relative liability to Tarkanian had been "actually and necessarily litigated" (University of Nevada, p. 1191). The record clearly demonstrated that this issue had not been raised, litigated, nor adjudicated.

Lastly, the court rejected UNLV's argument that appellate courts had no jurisdiction because UNLV did not appeal, nor did Tarkanian cross-appeal to them. The subsequent rulings in this case were resultant of the NCAA's appeals which gave the Nevada Supreme Court jurisdiction to consider the

entire judgment, including legal costs and attorney's fees. Furthermore, Tarkanian had been awarded full relief in the original ruling on this case, and therefore had no reason nor obligation to appeal that decision.

In affirming the district court's decision, the Supreme Court of Nevada ruled that the district court did not abuse its discretion by assigning the entire fee award against UNLV. The court noted that Tarkanian had "consistently prevailed" (University of Nevada, 1994, p. 1194) in litigation against UNLV and was entitled to appropriate legal fees.

Deli v. University of  
Minnesota (1994b)

Facts. Katalin and Gabor Deli were husband and wife women's gymnastics coaches at the University of Minnesota. Katalin Deli was hired as head coach in 1973 and was serving a three-year contract executed in 1990. Gabor Deli became the assistant coach in 1976 and served on a year-to-year appointment. Both coaches' employment arrangements were governed by a university policy manual which stipulated that university employees could be terminated for "just cause" (Deli, 1994b, p. 48).

In March 1992, Chris Voelz, the Director of Women's Intercollegiate Athletics at the University of Minnesota, discovered that a sexually explicit video of the Delis had been viewed by several members of the university's women's gymnastics team. Voelz investigated the incident and discovered that the video had been produced by Gabor Deli without his wife's approval. Nevertheless, Voelz determined that just cause existed for dismissal of both

parties, and terminated the Delis from their respective positions in the athletic department. The Delis filed grievances with the university which appointed a three-person panel to hold a hearing. Following the hearing, the panel's recommendation to the university president was that Gabor Deli's dismissal be upheld, but that Katalin Deli be reinstated as head coach. The panel failed to discover just cause for Katalin Deli's termination. The university president appointed Elton Kuderer, Chairman of the Board of Regents, to review the panel's recommendations and issue a final ruling. Kuderer ruled that just cause existed for both terminations, and Voelz's dismissal of both Delis was upheld. The Delis then filed a petition to the Court of Appeals of Minnesota to rule on the question of just cause and to determine if the termination procedures were impartial and proper.

Arguments. The Delis argued that Voelz failed to follow university policy in terminating their employment. University directives clearly state that approval from the vice president of academic affairs must be obtained prior to discharging a staff member. Voelz by-passed the vice president and proceeded directly to the university president to obtain approval to dismiss the Delis. The Delis maintained that the vice president's decision may well have been different than the president's because of his experience in dealing with termination cases. The Delis also pointed to numerous elements of the university grievance process which, they argued, prevented them from effectively challenging their termination.

The university argued that the procedures which directed Voelz to report to the vice president were drafted prior to the current president's directives obligating the athletic directors to report directly to him. Furthermore, the university argued that, because the Delis' termination settlement had to be approved by the university president, Voelz was required to consult him.

Decision/rationale. The Court of Appeals of Minnesota first addressed the question of whether the procedures followed by the university in terminating the Delis were fair and impartial. The court determined that the termination procedures followed by the university did not unfairly prejudice the Delis. Specifically, the court noted that Voelz's failure to follow proper procedures in obtaining approval to terminate the Delis "did not affect the eventual outcome of this case" (Deli, 1994b, p. 50).

The court then examined whether the university could demonstrate that the Delis were terminated for just cause. The court stated that the university had the burden of proving that the Delis "breached the standards of job performance established and uniformly applied" (Deli, 1994b, p. 52) by the university. The court found that Gabor Deli's conduct clearly established just cause for his dismissal. The court agreed with the panel's view that coaches incur "tremendous guidance responsibilities for their students" (Deli, p. 53). By producing a sexually explicit videotape and distributing it to his athletes, Deli clearly ignored those responsibilities and engaged in intolerable behavior.



The court also agreed with Kuderer's conclusion that just cause existed for Katalin Deli's dismissal as well. Voelz had submitted numerous reasons to the panel which, in her opinion, constituted just cause for Katalin Deli's termination. While the panel concluded that none of the incidents forwarded by Voelz established just cause for termination, Kuderer and the appeals court ruled that three of the violations did constitute just cause. It was discovered that on two separate occasions Katalin Deli had instructed her athletes to lie to authorities about various incidents. Deli also failed to follow safety procedures in the gymnastics room that were expressly directed to her by Voelz. The court found that these incidents clearly demonstrate dishonesty and insubordination--both of which "may be grounds for termination" (Deli, 1994b, p. 54). The court therefore ruled that the university was justified in its termination of the Delis for just cause and affirmed the university's decision.

Martz v. MacMurray  
College (1993)

Facts. In August 1986, Randy Martz signed a contract with MacMurray College to become their head baseball coach, assistant football coach, and recruiter. Martz's first contract ran from August 1, 1986 through May 31, 1987. Subsequent contracts ran from June 1 through May 31 of each year until Martz resigned in June of 1990. Each contract included a pro-rated four-week vacation period which Martz utilized in the month of July each year.

Upon his employment termination in 1990, Martz filed a claim against MacMurray College seeking to recover \$1,390 in vacation pay for the fiscal year of June 1, 1989 through May 31, 1990. The trial court granted summary judgment in favor of the college and Martz appealed.

Arguments. Martz argued that, beginning with his first contract in 1986, it was necessary to take vacation in the month of July because of coaching and teaching duties throughout the rest of the year. Martz realized that July was after the end of the fiscal year for which he was taking vacation, but maintained that MacMurray's athletic director, Robert Gay, encouraged coaches to follow this practice.

MacMurray's president, Edward Mitchell, stated that he alone had the authority to authorize employees to take "accrued vacation in a fiscal year or other period subsequent to the fiscal year in which that vacation was earned" (Martz, 1993, p. 1137). Mitchell stated that he had not done so, nor had he authorized Gay to modify his coaches' contracts in such a way. Gay maintained that he was not aware of Martz's belief that his July vacations were utilizing vacation time actually earned in the previous fiscal year. Gay believed "that the plaintiff's vacations, taken in July of each year, were for the same fiscal year in which such vacations were taken" (Martz, p. 1137).

Decision/rationale. The Fourth District Appellate Court of Illinois examined if the trial court was correct when it granted the defendants summary

judgment. Summary judgment is only appropriate if there are no genuine disputes over material facts in the case and one party is, by law, entitled to judgment. The appellate court determined that there were, in fact, unresolved issues of material fact and the summary judgment was made in error.

One issue the court raised was whether the vacation provision in Martz's contract was changed by acquiescence. A party to a contract can accept changes or acquiesce to changes in another party's obligations under the contract if the first party has "knowledge or reason to know of the nonconcurrency" (Martz, 1993, p. 1135). Because Gay encouraged Mertz to take vacation time in July, and Mertz's first contract ran from August through May, compliance with Gay's wishes would necessarily force Mertz to take his vacation after the expiration of his initial contract. This cycle was then repeated the next three years of Mertz's employment. The court determined that if Gay was aware of these conditions and voiced no objections, then acquiescence may have taken place.

Mitchell stated that even if Gay had accepted this deviation in Mertz's contract, he had no authority to do so. The court then asked "was this lack of authority known to [the] plaintiff?" (Martz, 1993, p. 1138). The court found it reasonable to believe that a new coach at the college could assume that the athletic director had the authority to alter his contracted vacation schedule. Therefore, the court found questions of fact regarding implied and apparent authority, the plaintiff's reliance on that authority, and the

college's right to summary judgment. The trial court's decision for summary judgment was reversed and remanded for trial.

Mackey v. Cleveland State  
University (1993)

Facts. Kevin Mackey had been employed as the head basketball coach at Cleveland State University since March 1983. On July 9, 1990, Mackey and Cleveland State agreed to terms of a new contract extending his employment at the university through June of 1992. On July 13, 1990, Mackey was arrested for driving a vehicle under the influence and violation of an open container law. Mackey held a press conference on July 17 where he admitted to having an alcohol problem that required professional treatment. Cleveland State announced that it was terminating Mackey's employment at the university on July 19. As a result of the July 13 incident, Mackey was indicted on cocaine charges and driving while intoxicated on August 11. These charges were dropped after Mackey completed a treatment program in October 1991.

Mackey filed suit against Cleveland State University as well as several university officials in their individual and official capacities claiming he was denied employment and other property interests without due process of law. Mackey claimed the actions of the defendants violated Sections 1983, 1985, and 1986, of Title 42 of the United States Code, the Rehabilitation Act of 1973, and various Ohio state statutes. Mackey also stated a claim for

damages pursuant to Section 1988 of Title 42. The defendants filed this motion to dismiss all claims.

Arguments. Mackey argued he was denied contractual and other property interests by the defendants without "any type of hearing whatsoever" (Mackey, 1993, p. 1406). Mackey contends this deprivation of rights by a state actor without due process is a clear violation of federal statutes. Mackey further argued that some defendants conspired to deprive him of his constitutional rights while other defendants allowed this deprivation to occur. Lastly, Mackey argued that the defendants violated the Rehabilitation Act of 1973 by denying him employment based solely on his handicap of alcoholism.

The defendants argued that they are protected from Mackey's due process claims by virtue of governmental immunity or qualified immunity. The defendants maintained that the university and its officials acting in their official capacities are protected from suit by Eleventh Amendment immunity. The university officials are protected from suit in their individual capacities by the doctrine of qualified immunity. Qualified immunity protects discretionary actions of government officials which do not violate clearly established constitutional or statutory rights of other parties.

The defendants also maintained that Mackey's claim under the Rehabilitation Act was groundless. The Rehabilitation Act does not protect an employee if "his substance abuse prevented him from performing his

essential duties, or presented a danger to property or safety of others" (Mackey, 1993, p. 1412). The defendants argued that clearly Mackey's alcoholism presents a danger to the lives of the young men for whom he is an authority figure. Furthermore, the defendants stated that Mackey cannot demonstrate that his handicap was the sole reason for his termination "because his criminal conduct served as a sufficient basis, standing alone, for discharge" (Mackey, p. 1413).

Decision/rationale. The United States District Court for the Northern District of Ohio dismissed all of Mackey's claims against the defendants except his claim that the defendants violated the Rehabilitation Act of 1973. Mackey's Section 1983 claims of due process violations against the university and its officials were dismissed. First, the court ruled that Mackey failed to state a claim for a substantive due process violation. While the court acknowledged that contractual rights are considered property under the Due Process Clause, "breach of contract by a public employer does not give rise to a Section 1983 claim for violations of substantive due process" (Mackey, 1993, p. 1402). Likewise, the court dismissed Mackey's claims of violations of procedural due process. State universities and its officials acting in their official capacities have consistently been defined by courts to be arms of the state and, therefore, protected by Eleventh Amendment immunity from suit for procedural due process violations. The defendants, as named in their individual capacities, successfully argued that qualified

immunity protected them from suit. The court ruled that the defendants had no constitutional obligation to hold a pre-termination hearing for Mackey if adequate post-termination remedies were made available by the state. Mackey failed to demonstrate to the court that state remedies for his loss were inadequate and, therefore, the claims against the officials in their individual capacities were dismissed.

Mackey's Section 1985 claims of conspiracy were also dismissed by the District Court. A requisite for a conspiracy claim is for the plaintiff to prove that he or she was discriminated against because of "racial, or perhaps otherwise class-based" (Mackey, 1993, p. 1408) factors. The court concluded that Mackey was not a member of a discernible class, and therefore unable to state a claim under Section 1985. Mackey's Sections 1986 and 1988 claims were also dismissed because they require a Section 1985 violation on the part of the defendants to be valid.

The court refused to dismiss Mackey's Rehabilitation Act claim, however. State actors are not immune from Rehabilitation Act claims because the United States Congress has "expressly abrogated states' Eleventh Amendment immunity with regard to the Rehabilitation Act" (Mackey, 1993, p. 1410). Alcoholism is acknowledged as a handicap and protected under the Rehabilitation Act. Mackey was, therefore, able to establish a prima facie case under the act which prevented the defendants from successfully dismissing this claim.

Dickens v. Quincy College  
Corporation (1993)

Facts. Randy Dickens signed a three-year contract to be head football coach at Quincy College beginning June 1, 1986. When this contract expired in 1989, Dickens entered into an oral agreement with the college extending his employment from September 1, 1989 to September 1, 1990. In October 1989, Dickens alleged that the college president orally advised him that his contract would be extended two additional years beginning September 1, 1990. Dickens maintained that he accepted this offer, but was subsequently fired by the college on March 25, 1991.

Dickens filed suit against the college for breach of contract and the defendants filed a motion to dismiss. Dickens' claims were dismissed by the trial court, his motion for reconsideration was denied, and he appealed.

Arguments. Dickens argued that termination of his employment constituted a breach of contract on the part of the college. He stated that the alleged breach was the "direct and proximate cause" (Dickens, 1993, p. 383) of his loss of income and benefits. The college argued that Dickens' claim should be dismissed because the Illinois statute of frauds rendered it unenforceable. The statute of frauds simply states that employment contracts that cannot be fulfilled within one year must be in writing.

Decision/rationale. The Appellate Court of Illinois for the Fourth District agreed with the trial court that the statute of frauds prohibited enforcement of Dickens' oral contract. Because the one-year contract had already been



performed when Dickens was terminated in 1991, the alleged two-year extension was the contract in question. The court noted that not only did the duration of the extension exceed what is allowed under the statute of frauds, but the extension would not even begin until 11 months after the agreement. Obviously, this oral contract could not have been fully executed within one year of the agreement.

The Appellate Court also denied Dickens' arguments that various legal doctrines be invoked which would "bar the application of the statute of frauds" (Dickens, 1993, p. 385). First, the court ruled that the partial performance exception to the statute of frauds did not apply in this case. The partial performance exception applies when there has been partial performance of the contract in question and there are no remedies available to achieve equity. Since Dickens sought damages in this case, the court ruled that, by law, he was precluded from invoking the partial performance exception. Next, the court stated that Dickens could not raise the doctrine of equitable estoppel because he could not prove misrepresentation on the part of the defendants. Lastly, Dickens' attempt to raise the doctrine of promissory estoppel to prevent application of the statute of frauds was also rejected by the court. The doctrine of promissory estoppel "is used to imply a contract where none exists" (Dickens, 1993, p. 386). The court noted that, unlike equitable estoppel, promissory estoppel is not an exception to the statute of frauds. The court maintained that a liberal application of the

doctrine of promissory estoppel would have an adverse "impact on the concept of employment at will" (Dickens, p. 386). The court reasoned that if the statute of frauds prevented the enforcement of an oral contract, it would likewise prevent the implication of the existence of a contract through the doctrine of promissory estoppel. The Appellate Court therefore affirmed the trial court's dismissal of Dickens' breach of contract claim.

Griffin v. Triton College (1993)

Facts. Clarence Griffin was a tenured employee as head basketball coach and physical education instructor at Triton College. In July 1990, allegations surfaced that Griffin had misappropriated funds from one of his student's Pell Grant checks. Griffin was allowed to address the charges against him in a closed session with the college's board of trustees. After forwarding his explanation of the events to the board, he was excused from the room while the board deliberated. While waiting outside the board room, a Triton College attorney approached the teachers' union representative, James O'Malley, who was representing Griffin. After a short discussion with the attorney, O'Malley told Griffin that he could resign immediately or face formal charges in the board's open session which was to begin in 15 minutes. Faced with those alternatives, Griffin agreed to sign a letter of resignation.

Griffin later filed suit against Triton College under Section 1983 of Title 42 of the United States Code claiming that the defendant college denied him

his Fourteenth Amendment right of due process as well as claiming various state contractual violations. Triton College field a motion for summary judgment on Griffin's claims.

Arguments. Griffin argued that he was coerced into resigning in violation of his constitutional right of due process. The college argued that Griffin's claims against it are actually claims of respondeat superior which is unavailable as a claim under Section 1983. Furthermore, the college argued that Griffin could not demonstrate that his dismissal was a result of "custom or policy" (Griffin, 1993, p. 1324) on the part of Triton College--an element required of a valid Section 1983 claim against a public institution.

Decision/rationale. The United States District Court for the Northern District of Illinois ruled that Griffin would have to show that Triton College deprived him of a constitutionally protected right in accordance with an institutional custom or policy to successfully state a Section 1983 claim. Griffin was unable to point to any institutional policy or custom at Triton College which led to the deprivation of his due process rights.

Because no custom or policy at the institution was apparent, the court stated that Griffin would have to demonstrate that the coercion of his resignation was "the decision of the highest officials responsible for setting policy in that area of the entity's business" (Griffin, 1993, p. 1325). In other words, for Griffin to be successful on his claim, he would have to prove that the college's board of trustees knowingly coerced a resignation

from him. The court found that Griffin was unable to do so, nor could he prove that the board had decided to terminate him had he not resigned.

Because Griffin could not demonstrate that his deprivation was a result of Triton College policy or custom, nor that he was coerced by the board of trustees, the defendant's motion for summary judgment was granted. The court dismissed all state contractual claims against the defendant as well.

Willson v. Board of Trustees of  
The Ohio State University (1991)

Facts. In 1977, Michael Willson was hired as men's gymnastics coach at The Ohio State University (OSU) and reappointed on an annual basis through June 1988. On June 10, 1988, Jim Jones, OSU Athletic Director, sent Willson a memo indicating Jones' intent to reappoint Willson and recommend he receive a 2.7% salary increase. Sometime the next week, Jones decided not to reappoint Willson and withheld Willson's Notice of Reappointment dated June 3, 1988. Jones called a meeting with Willson and OSU's Associate Athletic Director, Bill Myles, at which time he notified Willson of his decision not to reappoint him. Jones cited Willson's personal problems and age, as well as incidents in which team members had complained to Jones about Willson's conduct. Jones offered Willson the opportunity to resign or accept a one-year position in the athletic department ticket office where he could "reevaluate his career goals" (Willson, 1991, \*3). Willson asked that he be allowed to delay his resignation until after the upcoming Olympic Trials and until he had an opportunity to pursue the

coaching position at Michigan State University. Jones agreed to these requests.

Willson returned to OSU from the Olympic Trials and told Myles that he was unable to resign until he secured a comparable job. Willson then contacted the university personnel office to inquire why he had not received a Notice of Appointment for the 1988-89 academic year. The personnel office produced a duplicate notice which Willson accepted and signed. Willson later informed Myles that he would not resign. Jones responded by sending a message to Willson stating that he was to report to Myles for reassignment to the ticket office. Willson's attorney then informed Jones that Willson was willing to fulfill his contractual obligations as head gymnastics coach, but if the university was unwilling to fulfill its contractual obligations it should notify Willson immediately. On September 8, 1988, Jones sent Willson a letter informing him that he was terminated from employment at OSU effective October 7, 1988.

Willson filed suit against Jones and the OSU Board of Trustees alleging breach of contract, deprivation of property and liberty in violation of Section 1983 of Title 42 of the United States Code, and defamation. The defendants filed a motion for summary judgment on all claims arguing that no genuine issues of fact existed. On March 15, 1990, the trial court granted the defendants' motion for summary judgment on Willson's claims of deprivation of liberty without due process, and defamation. The court found

questions of fact with regard to Willson's claims of breach of contract and deprivation of property and sent these issues to trial.

Willson's breach of contract claim was tried to a jury which found that OSU breached its contractual obligations to Willson as gymnastics coach for the 1988-89 season. The jury then ruled that Willson could have found, and was actually offered, comparable work and therefore awarded Willson only one dollar in damages. Willson filed a motion for judgment notwithstanding the verdict seeking a larger award or a new trial. The trial court acknowledged that Willson had applied for other comparable coaching positions and that the university's offer to employ him in the ticket office was clearly not comparable. Therefore, the court awarded Willson the \$37,119.06 in unpaid wages under his contract.

The court also found that the defendants violated Section 1983 by depriving Willson in his property interest of employment without procedural due process. The court refused to reinstate Willson, however, as the duration of his contract had expired and his former position had already been filled. Willson was awarded one dollar in nominal damages as well as costs and attorney's fees.

The defendants appealed stating the trial court erred in: (a) denying their motion for summary judgment on Willson's breach of contract claim, (b) awarding contract damages notwithstanding the jury verdict, (c) denying their motion for summary judgment on Willson's Section 1983 claim,

(d) awarding Willson costs and attorney's fees, and (e) various procedural rulings. Additionally, Willson cross-appealed claiming the trial court erred in not ordering reinstatement after finding a Section 1983 violation.

Arguments. The defendants first argued that no breach of contract was possible because no contract existed. They contended that no offer, acceptance, nor meeting of the minds was demonstrated. Jones never delivered Willson's Notice of Appointment which, according to the defendants, was the only way a contract could be offered. The Notice of Appointment Willson signed at the personnel office was not valid because it was not delivered by Jones, the appointing authority. Furthermore, the defendants argued that even if the original letter sent to Willson was construed as an offer, it was never accepted, nor did it state the position to which Willson was being appointed.

The defendants next argued that the court's disregard for the jury's nominal award of one dollar for contract damages was in error. They alleged "that Willson failed to use ordinary effort to obtain similar employment and mitigate damages" (Willson, 1991, \*31) thereby preventing him from entitlement to compensatory damages.

Jones and the Board of Trustees also argued that they should have been granted summary judgment on Willson's Section 1983 claim because it was not necessary to provide Willson with due process when he was not reappointed as men's gymnastics coach. Furthermore, the defendants

maintained that they provided Willson with ample notice that he would not be reappointed as gymnastics coach. At that time, Willson could have requested a pre-termination hearing but failed to do so.

Lastly, the defendants argued that awarding attorney's fees to Willson was inappropriate. The defendants stated "that a court may not award relief requiring direct expenditure of funds from the state treasury for past wrongs" (Willson, 1991, \*39). They also argued that Willson's legal costs arose from his breach of contract claim, not his Section 1983 claim for which the costs were awarded.

Conversely, Willson argued that the court erred by not reinstating him to his former position as head men's gymnastics coach at OSU. Willson contended that it is well within the court's authority to reinstate a wrongfully terminated employee. Willson claimed "that it was only through reinstatement that his unlawfully deprived property right could be restored" (Willson, 1991, \*50).

Decision/rationale. The Court of Appeals of Ohio completely affirmed the judgment forwarded by the trial court. In doing so, the court rejected each assignment of error presented by the defendants and plaintiff.

Although the Vice President of Personnel Services for OSU testified to the fact that Jones was indeed Willson's appointing authority and alone had the authority to determine if Willson was to be reappointed, the Court of Appeals found otherwise. The court ruled that this characterization was



inconsistent with the directives in the OSU Bylaws and Faculty Rules. The Faculty Rules clearly state that the Board of Trustees is the appointing authority for all employees such as Willson. Therefore, once Willson's Notice of Appointment was generated with the Board's approval, an offer was made which Jones had no authority to withhold.

The court then ruled that the trial court's judgment notwithstanding the jury's verdict on damages was not an abuse of its discretion. The court agreed with the trial court that Willson attempted to obtain comparable employment as an intercollegiate gymnastic coach. The only two positions available were at Michigan State and the United States Naval Academy, and Willson unsuccessfully sought both positions. Additionally, the court concurred with the trial court that the position OSU offered Willson in the ticket office was clearly not comparable to the position of head men's gymnastics coach.

The court then ruled that Willson was entitled to procedural due process because he was deprived of his constitutionally protected interest in employment. The defendant's argument that Willson's failure to be reappointed did not entitle him to due process was not well taken. The court had already determined that Willson was, in fact, appointed by the Board of Trustees when his Letter of Appointment was generated. Therefore, Willson's property interest in continued employment was entitled to protection under Section 1983. The court noted that the procedures followed by the

defendants to deny Willson of his employment did not satisfy the required due process.

The court found that the trial court ruled correctly in awarding attorney's fees to Willson. Section 1988 of Title 42 of the United States Code allows reasonable attorney's fees to be awarded to prevailing plaintiffs in civil rights actions such as the one brought by Willson under Section 1983. The court ruled that if a "plaintiff succeeds on any significant issue in litigation which achieves some of the benefit he sought in bringing suit, he may be considered a prevailing party" (Willson, 1991, \*39). The court determined that Willson qualified as a prevailing party and was entitled to the attorney's fees awarded by the trial court.

Finally, the Court of Appeals ruled that the trial court appropriately exercised its discretion by not reinstating Willson as OSU's men's gymnastics coach even though he was unlawfully deprived of a constitutionally protected property right. Although reinstatement may have been appropriate, the court stated that the trial court possessed "wide discretion in fashioning a remedy" (Willson, 1991, \*50). The court noted that the trial court's reasons for not reinstating Willson were neither arbitrary nor unreasonable and, therefore, not found to be an abuse of its discretion.

In summary, the Court of Appeals affirmed the trial court's decision and all assignments of error forwarded by the defendants and the plaintiff were rejected. Willson was awarded damages equaling his unpaid salary for the

1988-1989 academic year and attorney's fees, but was denied reinstatement as OSU's men's gymnastics coach.

Brodhead v. Board of Trustees  
for State Colleges and  
Universities (1991)

Facts. Robert Brodhead, former athletic director at Louisiana State University, was hired as a consultant to a task force exploring the possibility of returning intercollegiate football to Southeastern Louisiana University (SLU). In addition to his consulting duties, Brodhead was coveted by SLU to become their athletic director and spearhead the fund-raising drive to return football to SLU. When asked what compensation was necessary for Brodhead to take the athletic director position, Brodhead stated a \$72,000 annual salary for five years. The Board of Trustees subsequently offered Brodhead a one-year, \$46,600 contract. The remainder of Brodhead's \$72,000 salary request was to be paid from booster funds and external fees. No formal contract specifying the duration of employment was ever signed, although Brodhead forwarded a proposal containing a buy-out provision in the event his employment was terminated prior to the requested five-year period. There was no evidence that the university accepted this proposal; instead the trustees forwarded a counter-offer where Brodhead's employment would be predicated on the success of the fund-raising campaign.

After 10 months of employment, Brodhead was over \$600,000 short of his projected fund-raising goal. Brodhead was terminated by the university, and their plans to reinstate football were scuttled. Brodhead filed suit against SLU and university officials for breach of contract. Brodhead sought damages for detrimental reliance, infringement on his property and liberty interests, and due process violations. The trial court awarded Brodhead damages equaling his salary for the remaining 50 months on the alleged oral contract, but denied any further damages. The Board of Trustees appealed this decision, as did Brodhead, claiming the trial court erred in not rewarding him further damages.

Arguments. Brodhead argued that he entered into an oral contract with SLU stating that he would be the athletic director for five years. He maintained that he should be awarded more than his remaining salary because of the hardships the breach of this contract caused him. The Board of Trustees argued that no formal agreement was ever reached as to the duration of Brodhead's employment. Brodhead was hired as an at-will employee and consequently could be dismissed at any time.

Decision/rationale. The Court of Appeal of Louisiana for the First Circuit ruled that no "meeting of the minds on the length of time of employment" (Brodhead, 1991, p. 752) between Brodhead and SLU had ever occurred. Absent a meeting of the minds, this particular contract's terms of duration

were void for lack of consent. Therefore, the court ruled that Brodhead was, in fact, an employee-at-will subject to termination at any time.

Furthermore, the court noted that the only officials with which Brodhead discussed a five-year contract lacked the authority to approve such a deal. Under Louisiana law, the Board of Trustees is the only entity which can approve faculty and staff contracts. The court stated that Brodhead, "a seasoned professional negotiator" (Brodhead, 1991, p. 753) and former state employee, should have been aware of these laws.

The Court of Appeals ruled that Brodhead did not possess a contract with SLU for a specific duration. Therefore, the court not only affirmed the trial court's denial of additional damages for Brodhead, but it reversed the trial court's decision to award salary damages for the remaining time on the alleged oral contract.

Kroll v. Board of Trustees of the  
University of Illinois (1991)

Facts. William Kroll, a former employee of the University of Illinois Athletic Association, filed a wrongful discharge suit against the Board of Trustees of the University of Illinois, the Athletic Association, and the director of the Athletic Association on January 6, 1989. On June 13, 1989, the United States District Court for the Central District of Illinois dismissed Kroll's complaint without prejudice ruling that the Board was protected from suit under Eleventh Amendment immunity.

Kroll filed an amended complaint on July 18, 1989, seeking relief under Section 1983 of Title 42 of the United States Code and naming only the Athletic Association and its director as defendants. Unbeknownst to Kroll, the Athletic Association no longer existed as an independent entity as it had merged with the Board of Trustees on June 30, 1989. The Board, once again, asserted its Eleventh Amendment immunity from Kroll's suit. This time, however, the District Court rejected the Board's claim of immunity and the Board appealed.

Arguments. The defendants argued that the Board of Trustees, "as the surviving entity of the merger" (Kroll, 1991, p. 906) with the Athletic Association, was clearly immune from suit. The Board had already been determined to be an arm of the state and the incorporation of the Athletic Association into the Board did not change that fact.

Kroll cited case law which ruled that state entities are immune from suit in federal court if state treasury funds are to be used to pay damages. In the case of the Athletic Association, Kroll argued that private funds alone subsidized the association. Kroll also maintained that the association may have possessed private insurance policies. Because of these factors, Kroll argued that any remedy awarded to him would not be paid through the use of public funds, thereby invalidating the Board's Eleventh Amendment immunity claim. Kroll further argued "that the Board, as successor to the

Athletic Association, cannot invoke the Eleventh Amendment because that defense was unavailable to the Athletic Association" (Kroll, 1991, p. 909).

Decision/rationale. The United States Court of Appeals for the Seventh Circuit first addressed the issue of Eleventh Amendment immunity itself. The court stated that a state may claim immunity from a federal suit unless one of two exceptions exists:

First, a state may by unequivocal language waive the protections of the Eleventh Amendment and thereby consent to suit in federal court.

Second, Congress may by unequivocal language use its enforcement powers under the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity. (Kroll, 1991, p. 907)

The court ruled that Congress had not abrogated the states' Eleventh Amendment immunity from Section 1983 claims. Case law clearly demonstrated that suits filed under Section 1983 "must still pay heed to the Eleventh Amendment" (Kroll, 1991, p. 909).

The court then addressed the question of whether a waiver existed in the language of the Illinois General Assembly's legislation which allowed the merger of the Athletic Association and the Board of Trustees. The District Court had identified an applicable waiver in the legislation and therefore denied the Board's claim to immunity. The Circuit Court, however, ruled that, while a waiver was present in the language, it was ambiguous at best. In the words of Judge Woods, "the language might consent to suit in

federal court, but then again it might not" (Kroll, 1991, p. 910). The court stated that federal courts are reluctant to find waivers and will always err on the side of immunity. The court then ruled that for Eleventh Amendment purposes, "an ambiguous waiver is no waiver at all" (Kroll, p. 910).

The Circuit Court, therefore, ruled that the Board of Trustees was entitled to claim Eleventh Amendment immunity. The District Court's ruling was reversed and remanded with instructions to dismiss the Board of Trustees as defendants.

Trefny v. Lake Forest  
College (1990/1991)

Facts. In August, 1981, Susan Trefny was hired by Lake Forest College to serve as the women's softball and field hockey coach. When the college terminated its field hockey program, Trefny assumed the position of women's soccer coach as well. On October 17, 1987, members of the college's women's soccer team violated the college's alcohol policy by consuming alcoholic beverages in their locker room after a game. An assistant to the college president became aware of the incident and confirmed the violation with a team member. This discovery was relayed to Michael Dau, the college's athletic director, who confronted Coach Trefny. Trefny denied the incident to Dau and again denied the incident to the college's president, Dr. Eugene Hotchkiss.

Upon further investigation, the president's assistant obtained additional information confirming the incident. After hearing of the investigation,



Trefny admitted to having lied to the president and athletic director and acknowledged that beer had been consumed in the team locker room. On November 17, 1987, Trefny wrote a formal apology to Hotchkiss recognizing that her unprofessional conduct may lead to her termination. If that were to be the case however, Trefny requested that she be allowed to continue her employment until the end of the academic year. Hotchkiss responded to Trefny by considering her letter as one of resignation, thus allowing her to retain her position through the end of the academic year. No further correspondence was undertaken between the parties until April 1988, when Trefny filed suit against the college alleging that Hotchkiss' actions constituted a breach of contract and violated Title VII of the Civil Rights Act of 1964. The college filed a motion for summary judgment on both of Trefny's claims.

Arguments. Trefny argued that Lake Forest College violated Title VII by discriminating against her based solely on her gender. She claimed that male coaches at the college were not treated as harshly as she when their teams were involved in alcohol-related incidents. Trefny cited examples of incidents at the college in which male coaches whose teams violated the alcohol policy were retained by Hotchkiss.

Trefny's breach of contract claim arises from the fact that she was not provided a hearing before her employment was terminated. She argued that

the college's Faculty Personnel Policy Handbook specifically entitled employees to a full hearing before dismissal.

The college argued that Trefny could not establish a prima facie case of discrimination necessary to successfully claim relief under Title VII. The college stated that Trefny was unable to demonstrate that she was "satisfactorily performing the duties of her position" (Trefny, 1990, \*7) or that she was discharged by the college. Both of the above elements are necessary to state a prima facie case. Additionally, the college refuted Trefny's claims that she was discharged simply because she was a female coach and that a double standard existed for male coaches. To the contrary, the college produced evidence that another female coach at the college whose team violated the alcohol policy was retained because she immediately accepted full responsibility for the incident, as opposed to Trefny's attempt to deceive the administration.

Lastly, the college argued that the doctrine of equitable estoppel prevented Trefny's breach of contract claim. This doctrine states that one party's failure to assert a contract right, if construed as consent by the other party, prevents the first party from asserting that right at a later date. In other words, when Trefny agreed to resign at the conclusion of the school year in lieu of a formal hearing, she abrogated her right to claim breach of contract based on the absence of a termination hearing.

Decision/rationale. The United States District Court for the Northern District of Illinois agreed with Lake Forest College that Trefny failed to establish a prima facie case of discrimination. The court stated that there was "no genuine dispute that she [Trefny] was not performing her duties satisfactorily" (Trefny, 1990, \*8). The court noted that the atmosphere of distrust created by Trefny's unprofessional conduct was detrimental to relationship with her superiors and clear evidence that she failed to meet the high standards of personal behavior expected of faculty members. Additionally, the court found that the college successfully "articulated a legitimate, non-discriminatory reason for its action--Ms. Trefny's lying to President Hotchkiss about the alcohol incident" (Trefny, \*10). Accordingly, the court granted the college summary judgment on Trefny's Title VII claim.

Likewise, the court rejected Trefny's breach of contract claim and granted the college summary judgment. The court ruled that Trefny could find no relief in the college's handbook because she declined to request a termination hearing and instead negotiated a new contract with the college. According to the court, when Trefny agreed to remain employed at the college until the conclusion of the academic year at which time she would resign, a new contractual agreement was clearly consummated. The college fulfilled all of its obligations to Trefny under this new agreement. Furthermore, the court stated that the doctrine of equitable estoppel did, in fact, disarm Trefny's breach of contract claim. When Hotchkiss agreed to allow

Trefny to remain employed until the end of the year, she did so, and "accepted her paycheck without protest or reservation" (Trefny, 1990, \*21). Thus, the doctrine of equitable estoppel prevented Trefny from belatedly claiming her contractual right to a hearing.

The court granted the college summary judgment on both of Trefny's claims and dismissed the case in its entirety. There were, however, further proceedings in 1991. This hearing was in response to a motion filed by the college to recover attorney's fees incurred by defending itself from Trefny's charges. The college argued that Trefny's suit was frivolous and continued beyond the point where her prospects of success had been eliminated. The court ruled that Trefny's suit was not frivolous but that Trefny's counsel continued the case past the point where he knew or should have known that no discrimination on the part of the college was evident. The court therefore assessed attorney's fees against Trefny's counsel, although the college's bill of costs was reduced by \$400 for excessive copy costs.

Gibson v. Kentucky State  
University (1990)

Facts. Kenneth Gibson, who had been employed by Kentucky State University as athletic director, professor, and coach, was the prevailing litigant in a wrongful discharge suit against the university. Gibson had been terminated by the university's Board of Regents in 1985 for participating as an official at the Caribbean Junior Olympics in Barbados against the orders of the university president, Raymond Burse. Gibson made the trip at his

own expense and in accordance with his recruiting duties as head track and field coach at Kentucky State.

At trial, a jury found that Gibson did not neglect his duties by making the trip to Barbados and that he was terminated without just cause. The jury awarded Gibson \$17,929.46 in compensatory damages, of which \$8,672.49 was for accumulated sick leave. They also awarded Gibson \$9,500 in punitive damages assessed against Burse. On appeal, the court affirmed the compensatory damages minus the value of accumulated sick leave and reversed the punitive damages awarded to Gibson. Gibson then appealed this decision to the Supreme Court of Kentucky seeking recovery of accumulated sick leave and punitive damages.

Decision/rationale. The Kentucky Supreme Court affirmed the Court of Appeals' rejection of accumulated sick leave recovery. The court noted that Kentucky law provides for recovery of direct compensation, but contains no provision for recovery of benefits such as sick leave.

The court then reversed the appellate court's decision regarding punitive damages. The appellate court had ruled that the jury's award of punitive damages against Burse was inappropriate because compensatory damages were not directly assessed to Burse. The Kentucky Supreme Court, however, determined that compensatory damages were awarded jointly and severally against all of the defendants, of which Burse was one. Therefore, awarding punitive damages against one of the named defendants was

appropriate. Accordingly, the court reinstated the \$9,500 in punitive damages against Burse that were originally awarded to Gibson by the jury.

Frazier v. University of the District of Columbia (1990)

Facts. Bobby Frazier had been employed in various positions at the University of the District of Columbia (UDC) from 1983 to 1990. On February 15, 1990, UDC President Cortada terminated Frazier from his position as UDC head football coach. Two days later, Cortada allegedly assured Frazier that he would reassign Frazier to another position at the university. Frazier was never reassigned and subsequently filed suit against UDC claiming wrongful discharge, a civil rights violation, and breach of contract. The defendant university filed a motion to dismiss all of Frazier's claims.

Arguments. Frazier argued that he was wrongfully terminated in violation of his civil rights when UDC discharged him without a termination hearing. Frazier further contends that, to his detriment, he relied on the unfulfilled promise made by Cortada that he would be reassigned to another position at the university. Frazier argued that this failure on the part of UDC to fulfill this promise constituted a breach of contract.

Decision/rationale. The United States District Court for the District of Columbia addressed each of Frazier's claims individually. First, the court stated that Frazier was clearly employed as an at-will employee because he had no contract with the university that specified a duration of employment. Employees-at-will may be terminated at any time and for any or no reason.

Accordingly, the District of Columbia does not recognize wrongful discharge actions for at-will employees. Therefore, Frazier's wrongful discharge claim was dismissed.

Second, the court ruled that, given the fact Frazier was an employee-at-will with no contractual agreement, he had no property interest in continued employment. Consequently, Frazier had no right to a termination hearing. Without such a right, Frazier's civil rights could not be violated by the failure to conduct a hearing and Frazier's civil rights claim was also dismissed.

Lastly, the court dismissed Frazier's breach of contract claim. Frazier's contract claim arose from the alleged promise by Cortada to reassign Frazier to another position at the university. The court noted that this alleged promise was made in a conversation which took place two days after Frazier was terminated from employment at UDC. Therefore, Frazier was not a university employee at the time of the promise and consequently not legally able to state a breach of contract claim for failure to be reassigned. Additionally, the court stated that federal officials cannot create contractual liability on the part of the Federal Government by failing to fulfill verbal agreements to their employees. Therefore, even if Cortada's alleged promise was determined to constitute a rehiring of Frazier, UDC's failure to abide by the agreement could not be construed as a breach. The university's motion to dismiss each of Frazier's claims was granted.

McGehee v. Broward  
Community College (1990)

Facts. William McGehee was a coach and instructor at Broward Community College when he sustained a shoulder injury. McGehee was unable to continue the performance of his duties at the college and claimed workers' compensation. When McGehee was later released from a pain clinic, his disability benefits were discontinued even though he had not yet fully recovered from his injury. Subsequently, McGehee sent the college's servicing agent a letter in which he requested additional benefits to include psychiatric care for chronic depression associated with his injury. The agent refused medical treatment for McGehee's mental illness, yet McGehee sought unauthorized psychiatric care nonetheless.

A compensation claims judge determined that McGehee "had not reached maximum medical improvement, was not totally disabled, and had not conducted adequate search for award of temporary partial disability benefits" (McGehee, 1990, p. 368). The judge further ruled that McGehee was not entitled to payment of unauthorized psychiatric treatment bills. McGehee appealed this decision.

Arguments. McGehee provided confirmation from his psychiatrist that his psychiatric treatment was necessary because he was suffering from "a chronic depressive illness with a chronic pain syndrome" (McGehee, 1990, p. 369) which were related to his injury. The defendants noted the fact that McGehee's claims for psychiatric care were unauthorized. Furthermore, the



lower court noted that McGehee's psychiatrist's claims were not filed in a timely manner as required by Florida statutes.

Decision/rationale. The First District Court of Appeal of Florida affirmed the lower court's denial of McGehee's claim to partial disability benefits. The court did, however, reverse the lower court's denial of psychiatric costs. The court found that the compensation judge failed to inquire as to the "reasonableness and necessity" (McGehee, 1990, p. 370) of McGehee's psychiatric treatment. Even though these payments were initially unauthorized, they would have been appropriate if they were necessary to facilitate the plaintiff's recovery. Furthermore, the lower court had the authority to pardon the untimely filing of claims by the psychiatrist's office for extenuating circumstances. Accordingly, the court found adequate cause to question the lower court's denial of psychiatric costs and reversed that portion of its decision, remanding it for further consideration.

Wood v. Loyola Marymount  
University (1990)

Facts. Marvin Wood was employed as head baseball coach at Loyola Marymount University from 1969 to 1984. Each year, Wood received an employment continuation letter from the university stating his next year's salary and his eligibility for employee benefits. Additionally, in 1971 Wood received a letter from the university president stating that, although the annual letters of continuation appeared to be year-to-year reappointments, Wood was actually a continuous employee of the university subject to

satisfactory performance. On May 18, 1984, Wood was notified by the university's athletic director, Robert Arias, that he would be terminated effective June 4, 1984. Wood "was terminated without warning, advance notice or any hearing" (Wood, 1990, 234). Furthermore, Wood was given no justification for his discharge, nor given an opportunity to defend his position.

Wood filed a wrongful termination suit against Loyola Marymount and Arias. The trial court granted summary judgment in favor of the defendants. Wood appealed the summary judgment on the basis that there were, in fact, issues of material fact with regard to the existence of a continuous contract.

Arguments. Summary judgment may only be allowed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Wood argued that there was clearly an implied-in-fact contract between he and the university that prohibited his termination without just cause. Wood cited the university's personnel policy manual, his longevity at the university, and assurances by the university of continued employment as evidence that an expectation existed which prevented termination without good cause. He further argued that good cause did not exist, and, even if it had, the university failed to follow its published termination procedures.

The defendants argued that Wood was clearly hired as a year-to-year employee and could be terminated without reason at the conclusion of an

academic year. They also maintained that Wood's claim of an implied-in-fact contract is erroneous because an express contract already existed in the form of the annual continuation notice and the 1971 letter from the university president. The defendants interpreted the 1971 letter as characterizing Wood's employment status at the university as one of at-will. Additionally, Arias and the university contended that there was good cause for Wood's termination. They pointed to the baseball team's losing record and evidence of growing discontent amongst Wood's players.

Decision/rationale. The Second District California Court of Appeal ruled that Wood had raised sufficient question as to whether his employment was year-to-year, as the defendants maintained, or continuous, as he argued. Wood was also successful in raising a "triable issue of material fact whether there was an implied-in-fact agreement to terminate only for cause" (Wood, 1990, p. 234). Since this review was regarding a motion for summary judgment by the defendants, Wood was not required to prove that an implied-in-fact contract existed, only establish a triable issue as to its existence. As Justice Fukuto wrote in the majority opinion, "the burden was on the university and Arias to prove that an implied-in-fact agreement to only terminate Wood for good cause did *not* exist" (Wood, p. 233).

The court further determined that the defendants failed to prove that good cause to terminate Wood existed. The court stated that a coach at a university is an educator who "is to be judged by his overall contribution to

the success of the learning institution for which he works" (Wood, 1990, p. 235), not just his winning percentage. The court found Wood to be not only a coach, but a counselor and mentor as well. These factors led the court to question whether the university's reasons to terminate Wood were fair and honest or capricious and trivial. Lastly, the court found serious questions of fact with regard to the university's adherence to its published termination procedures. Accordingly, the court reversed the trial court's entry of summary judgment on behalf of the defendants.

In a dissenting opinion, Justice Compton maintained that a private employer such as Loyola Marymount should be allowed to make personnel decisions freely. Compton rejected the notion that an implied-in-fact contract exists where a private employer has not negotiated a collective bargaining agreement nor entered into an individual contract with an employee. Compton wrote:

The suggestion by some recent court decisions that some how a binding contract of employment can be "implied" by nothing more than satisfactory performance by the employee and praise and promotion by the employer stands traditional concepts on their heads and will discourage employers from praising or promoting employees for fear that in doing so they are locking themselves into a binding contract which neither party ever contemplated. (Wood, 1990, p. 236)

Because the court did not possess the authority to order the university to reinstate Wood, Compton concluded Wood's claim to be nothing more than a disgruntled employee seeking "court ordered 'severance pay'" (Wood, 1990, p. 237). Compton noted that the question of whether damages should be allowed in similar situations under California law was a question for the state legislature to answer. Therefore, Compton chose to affirm the lower court's entry of summary judgment.

### Suits by Students

#### Cooper v. Peterson (1995)

Facts. In October 1994, St. Lawrence University (SLU) announced that it would eliminate the intercollegiate wrestling program following completion of the 1994-1995 season. University officials pointed to increasing budget constraints as the primary reason for the elimination. Members of the St. Lawrence wrestling team filed suit and sought a temporary injunction prohibiting the university from eliminating the wrestling program until May of 1998. The plaintiffs claimed the elimination of the program constituted breach of contract, misrepresentation, fraud, and sexual discrimination. The Defendants filed a motion to dismiss the case based on the plaintiffs' failure to state a claim upon which relief is available.

Arguments. The plaintiffs claimed that recruiting materials they received from the St. Lawrence wrestling coach consistently referred to the traditional strength and stability of the wrestling program. Coach David Hudson

confirmed that he had made positive representations to recruits and that he had "absolutely no idea . . . that the wrestling program was even being considered for termination" (Cooper, 1995, \*3). The plaintiffs argued that, based on the representations made by the university, the wrestling program should be continued until the current freshmen class graduates in 1998.

The defendants maintained that their decision to eliminate the program was protected by their authority to make decisions in the best interest of the university. The defendants further argued that the plaintiffs alleged unwritten contract is barred from enforcement by the New York Statute of Frauds. The Statute of Frauds nullifies oral agreements which cannot be fully performed within one year from the time of the agreement.

Decision/rationale. The Supreme Court of New York, St. Lawrence County, was not persuaded by the plaintiffs' breach of contract argument. The court ruled that no contract, either written or oral, had been entered into by the defendants promising the plaintiffs a position on a wrestling team. The plaintiffs had not received athletic scholarships but, rather, "financial aid on the same criteria as all other SLU students" (Cooper, 1995, \*5). These financial aid agreements would be honored by the university whether or not it sponsored a wrestling team. The court further ruled that the plaintiffs could not demonstrate that their decisions to attend SLU was based solely on the alleged athletic agreement.

The court also found the plaintiffs' misrepresentation, fraud, and sexual discriminations claims to be substantively lacking. At the time the plaintiffs were recruited, SLU had no intention of eliminating its wrestling program. It was clear to the court that this alternative was first discussed after all the plaintiffs had been enrolled at the university. Misrepresentation and fraud claims can only be successful if the defendant made false representations to the plaintiffs knowingly. Likewise, the plaintiffs' sexual discrimination claims were found to be invalid because they could not demonstrate that the elimination of the wrestling program "constituted an intentional discrimination" (Cooper, 1995, \*10). The court also ruled that the plaintiffs had been denied neither the opportunity to participate in, nor the benefits of SLU's athletic program based on their gender.

For these reasons, the court granted the defendants' motion to dismiss all of the plaintiffs' claims. As a result of the dismissal of the plaintiffs' claims, the court found the plaintiffs' request for a preliminary injunction to be moot.

Laxey v. Louisiana Board of Trustees (1994)

Facts. Gregory Laxey, a football player at the University of Southwestern Louisiana, was arrested and charged with three counts of cocaine distribution. The day after Laxey's arrest, the head football coach at Southwestern Louisiana removed Laxey from the team and revoked his

scholarship without a hearing. Subsequent university disciplinary committee hearings upheld Laxey's suspension as well as his scholarship revocation.

Laxey filed suit under Section 1983 of Title 42 of the United States Code claiming the university violated state tort law and failed to provide him due process in suspending him and revoking his scholarship. The United States District Court for the Western District of Louisiana granted the university summary judgment on the basis of governmental immunity. Laxey appealed this decision to the Fifth Circuit Court of Appeals.

Arguments. Laxey argued that his dismissal from the football team together with the revocation of his scholarship served to deprive "him of liberty and property rights without due process of law and in denial of equal protection" (Laxey, 1994, p. 622). He further argued that an article about him published in the student newspaper was defamatory in nature. Lastly, the appellant argued that summary judgment was inappropriate because of what he sees as a dispute over material facts in the case. The disputed facts, according to Laxey, were present in the timeline leading to his suspension from the team.

The defendant university moved "for summary judgment, claiming immunity under the Eleventh Amendment, the failure by the plaintiff to demonstrate a cognizable property or liberty interest, and compliance with due process requirements" (Laxey, 1994, p. 622). The defendants further



claimed that the article which appeared in the student newspaper was, by law, not defamatory.

Decision/rationale. Depending on a public university's relationship to the state government and its status under state law, it may qualify for governmental immunity. In this case, the Fifth Circuit Court of Appeals ruled that the University of Southwestern Louisiana clearly was "an arm of the state" (Laxey, 1994, p. 623), and therefore protected by the Eleventh Amendment from suit in federal court. In an attempt at a football analogy, Judge Smith wrote: "The Eleventh Amendment is like a defensive lineman, barring all suits in law or equity against an unconsenting state" (Laxey, p. 623).

The Circuit Court affirmed the District Court's ruling of summary judgment in favor of the defendants and dismissed Laxey's claims. This opinion also included a footnote stating that the defendants were not considered "persons" as required for a Section 1983 claim. This fact alone would also have been sufficient for dismissal.

Conard v. University of  
Washington (1991/1992)

Facts. Kevin Conard and Vincent Fudzie were members of the University of Washington football team who received athletic scholarships and enrolled in the university in 1983. Over the next two years, Conard and Fudzie were involved in a number of incidents, including extortion, unlawful imprisonment, assault, and use of a stolen meal card. After several warnings, head football coach Don James dismissed both Conard and Fudzie

from the team in December 1985. James further advised them that, although their scholarships would be honored until the end of the 1985-1986 academic year, he would not recommend that their scholarships be renewed.

On July 1, 1986, both students were notified in writing that their scholarships would not be renewed for the 1986-1987 academic year and that they could request a hearing with the Athletic Financial Aid Committee to contest this decision if they so desired. Fudzie requested a hearing and Conard declined as he had become academically ineligible to return to the university. On September 22, 1986, the Athletic Financial Aid Committee heard Fudzie's challenge to the Department of Intercollegiate Athletics' version of his alleged misconduct, then decided unanimously to uphold the decision of Fudzie's scholarship nonrenewal.

In December 1988, Conard and Fudzie filed suit against the university for breach of contract and against Coach James, his wife, and the university for tortious interference with contractual relations. The trial court granted summary judgment in favor of the defendants and dismissed the suit. The plaintiffs appealed to the Washington Court of Appeals which affirmed the trial court's rulings regarding breach of contract and interference. The Court of Appeals then raised a new issue when it ruled that the university had failed to provide Fudzie with due process when denying renewal of his scholarship. The court then remanded Fudzie's case back to the university

for a proper hearing providing Fudzie procedural due process. The plaintiffs then petitioned the Supreme Court of Washington for review of their breach of contract claims, Conard's due process claim, and Fudzie's request for damages for due process violations. The university petitioned the Supreme Court of Washington to review the Court of Appeals' ruling that Fudzie's due process rights were violated. The court agreed to review the due process questions only.

Arguments. The plaintiffs argued that the trial court erred in finding no dispute of material facts with regard to the intended duration of their scholarships. Conard and Fudzie both provided affidavits stating that they believed their scholarships were offered for four or five years depending on red-shirt requirements. They contended that this contractual expectation was clearly breached when the university failed to renew their scholarships. Fudzie further argued that Coach James intentionally interfered with Fudzie's contract by recommending nonrenewal. Fudzie claimed that James' actions were beyond the scope of his authority.

The university argued that, regardless of a player's expectations, the financial agreement both players signed clearly stated the scholarship was for one academic year with the possibility of future assistance if the player remains eligible and in good standing. Furthermore, the university did not revoke financial assistance of either plaintiff during the academic year for which the scholarship was granted, even after they were dismissed from the

team. There was absolutely no legal obligation on the part of the university to renew either student's scholarship after the active contract expired.

As to the claims of contractual interference, the defendants argued that Coach James was acting in good faith and well within the scope of his employment as defined by the university when he recommended nonrenewal of the plaintiffs' scholarships. The defendants also stated that, by law, James could not be held liable for tortious interference because he was not an "intermeddling third party" (Conard, 1991, p. 1248). The university also argued that the three-year statute of limitations barred the plaintiffs from recovery as well as the fact that they failed to "exhaust administrative remedies" (Conard, p. 1249) as required by the Higher Education Administrative Procedure Act (HEAPA). (The HEAPA has since been repealed).

Decision/rationale. The Court of Appeals upheld the trial court's decisions that there was no breach of contract by the university nor contractual interference by the defendants. The court agreed that the contractual obligation of the scholarship was clearly for one year and, because the university did not revoke either plaintiff's scholarship, there was no burden on the university to prove "serious misconduct" (Conard, 1991, p. 1246) on the part of the plaintiffs. The Court of Appeals also concurred with the trial court that Coach James was acting well within the scope of his duties when he recommended nonrenewal of the plaintiffs' scholarships.

In comments which had no significant bearing on the case, the Court of Appeals rejected the university's arguments concerning the statute of limitations and plaintiffs' failure to exhaust administrative remedies before filing suit. The Court of Appeals dismissed all of Conard's claims because he had become academically ineligible and because he failed to request a hearing after receiving his nonrenewal notification. The hearing that Fudzie requested became the focus of the Court of Appeals decision.

Although the issue of due process was not even raised by the plaintiffs, the Court of Appeals ruled that Fudzie's hearing provided him inadequate due process as guaranteed by the Fourteenth Amendment of the United States Constitution. The court ruled that "Fudzie's scholarship, issued under a representation that it would be renewed subject to certain conditions, provided him with a legitimate claim of entitlement that warrants the protection of due process before any deprivation of that claim of entitlement" (Conard, 1991, p. 1246). The court stated that due process required for the revocation of a property interest of this magnitude must include the following elements: (a) notice, (b) copies of information upon which the nonrenewal recommendation was based with adequate time to prepare a response, (c) opportunity to rebut, (d) objective decision-maker, (e) right to counsel and record of hearing, and (f) written notice of decision. The Court of Appeals then remanded the case back to the university to conduct a proper hearing of Fudzie's scholarship renewal.

The Supreme Court of Washington granted review solely on the federal due process claim raised by the Court of Appeals. The court stated that property interests protected under due process exist if there is a "legitimate claim to entitlement" (Conard, 1992, p. 22). The court stated that, in this case, there are three means through which a legitimate claim to entitlement may have been created: (a) specifically stated in the terms of the contract; (b) a mutually explicit understanding; or (c) procedural requirements as stated in statutes, rules, and regulations which mandate outcomes if certain facts are present. The court addressed each of these possibilities independently.

The court ruled that the plaintiffs' scholarship contracts clearly stated the duration of the scholarships to be one academic year. This precludes the creation of a protected property interest for more than one year at a time. The court also found no legitimate claim of entitlement to scholarship renewal found in the terms of the contract.

The plaintiffs alleged a mutually explicit understanding that their scholarships would be renewed if they complied with university, Pacific-10 Conference, and NCAA rules. This, they argued, established a claim of entitlement to the renewal of their scholarships. The plaintiffs further argued that the "serious misconduct" (Conard, 1992, p. 18) cited by the NCAA as grounds for scholarship revocation was never demonstrated by the university. The court held that, although scholarships were normally renewed at

Washington, this fact alone did not create a mutually explicit understanding that the plaintiffs' scholarships would also be renewed. To the contrary, the fact that the plaintiffs' scholarships were not renewed "only reflects the rarity of this level of misconduct" (Conard, p. 24).

As to the plaintiffs' claims that the university never demonstrated serious misconduct on the part of the plaintiffs, the court found them to be irrelevant. Establishing serious misconduct is only required of a university if it alters or terminates financial aid during the period for which it had been contracted. Since the university did not revoke any financial assistance, but instead, denied renewal, no establishment of serious misconduct was necessary and therefore no explicit understanding of scholarship renewal absent of any serious misconduct was present.

Lastly, the court addressed any procedural requirements which may have created a protected property interest in the renewal of the plaintiffs' scholarships. A protected property interest can be established by rules or regulations which guide decision-makers to a mandatory outcome based on predicated facts. The court found no standards or language that directed the university to renew scholarships based on certain criteria. Scholarship renewal was found to be largely discretionary and, therefore, not sufficiently limited as to create a protected property right for student-athletes.

The Supreme Court of Washington ruled that the plaintiffs had no protected property interest in their scholarship renewal. The University of

Washington was, therefore, not required under the Fourteenth Amendment to provide the plaintiffs with full procedural due process. The Court of Appeals' decision remanding Fudzie's case to the university for another hearing was reversed. All other claims addressed by the Court of Appeals were affirmed.

Manuel v. Oklahoma City  
University (1992)

Facts. Eric Manuel attended the University of Kentucky on a basketball scholarship his freshman year. A subsequent investigation of the University of Kentucky's basketball program resulted in allegations of academic fraud on the part of Manuel when taking college entrance exams. As a result, Manuel's NCAA eligibility was revoked and he was prohibited from participating on Kentucky's basketball team. Manuel refused the university's offer to honor his scholarship even though he was ineligible, choosing instead to transfer to a junior college.

After graduating from junior college, Manuel was recruited by a number of National Association of Intercollegiate Athletics (NAIA) institutions, one of which being Oklahoma City University (OCU). The NAIA then declared Manuel ineligible for competition at an NAIA institution because of an NAIA by-law citing termination of eligibility.

Manuel filed suit seeking a permanent injunction prohibiting the NAIA from interfering with his scholarship opportunities and enjoining OCU to honor its contractual obligations of a basketball scholarship. The trial court



granted Manuel a permanent injunction enjoining the NAIA and OCU from interfering with his scholarship for 10 semesters or until he graduates, whichever occurred first. The NAIA appealed the injunction and, after determining the case was not moot even though Manuel had completed his eligibility, the Court of Appeals of Oklahoma, Division No. 1, heard the case.

Arguments. The NAIA claimed that Manuel was ineligible to compete at an NAIA institution because of a by-law which states that an athlete who "has completed eligibility at a four year institution is ineligible for further intercollegiate competition" (Manuel, 1992, p. 291). The NAIA was referring to the fact that Manuel had been declared ineligible by the NCAA. The NAIA further stated that it was important for the Court of Appeals to rule on this matter because it could subject OCU to retroactive penalties and sanctions.

OCU was in an awkward position. Its representatives clearly believed that Manuel was eligible, yet were concerned with facing possible retaliatory actions taken by the NAIA. OCU's athletic director and basketball coach testified that Manuel was clearly eligible to compete under NAIA rules. The basketball coach, Darrell Johnson, said the NAIA improperly applied the termination of eligibility rule. He stated that NAIA by-laws outlined the three avenues through which a student can exhaust his or her eligibility as: (a) completion of 10 semesters, (b) graduation, or (c) participation in four competitive seasons. Johnson maintained that "hundreds of students"

(Manuel, 1992, p. 291) who are ineligible to compete for NCAA institutions are routinely declared eligible for competition at NAIA institutions. Johnson then named at least 15 players who had competed for NAIA institutions after having been declared ineligible for competition by the NCAA.

Manuel originally argued for the permanent injunction based on the irreparable harm he would suffer if injunctive relief was denied and his scholarship revoked. On appeal, Manuel maintained that, although he exhausted his eligibility, affirmation of the trial court's decision was important to prevent the NAIA from taking punitive actions against him. These actions could deny him of the property interest he has in the awards and honors he received while competing at OCU.

Decision/rationale. Although courts generally refrain from interfering with activities of voluntary associations, the Court of Appeals intervened because it ruled that the NAIA had arbitrarily applied its own rules in Manuel's case. The court found no NAIA rule that required the NAIA to declare a student-athlete ineligible simply because the NCAA had done so. By declaring Manuel ineligible, "the NAIA had, in effect, created a special rule for Manuel" (Manuel, 1992, p. 292). Because of the reliance on public funds and facilities by many educational institutions, the court stated that these institutions and their governing bodies have an obligation to treat all students equally under their rules. The court ruled that the NAIA had not done so in this case.

The court stated that appellate courts will reverse injunctive relief granted by lower courts only when the lower court has "clearly abused its discretion" (Manuel, 1992, p. 293). This was clearly not evident in the case at hand as Manuel established the possibility of irreparable harm without injunctive relief, while OCU and the NAIA were in no danger of harm as a result of an injunction. Furthermore, the court cited public policy considerations as favoring an injunction. The Court of Appeals agreed with the trial court's sentiments that "the benefits received by the community-at-large from having a high number of college graduates among its numbers are so obvious that they require no discussion" (Manuel, p. 293). Therefore, the Court of Appeals ruled that the permanent injunction was appropriate and affirmed the trial court's decision.

Ross v. Creighton University  
(1990/1992)

Facts. Kevin Ross was a gifted high school basketball player who was recruited to play at Creighton University and enrolled in the Fall of 1978. Ross did not have a strong academic background, scoring well below the average freshman at Creighton on college entrance exams. Creighton was well aware of Ross' academic shortfalls and had assured Ross he would receive adequate tutoring to ensure "he 'would receive a meaningful education while at Creighton'" (Ross, 1992, p. 411).

Ross attended Creighton for four years, maintaining a "D" average with credits far short of those required to graduate. Many of the credits Ross

earned were not applicable toward a degree and, Ross alleged, were for classes recommended by the Creighton coaching staff simply to help Ross maintain his eligibility. Ross also claimed that the Athletic Department employed a secretary to write his papers and complete his assignments while failing to provide him with adequate tutoring as promised.

When Ross departed Creighton, he had the reading skills of a seventh grader and the language skills of a fourth grader. Ross subsequently filed suit against Creighton University for negligence and breach of contract. The United States District Court for the Northern District of Illinois dismissed Ross' suit for failure to state a valid claim, and Ross appealed to the Seventh Circuit Court of Appeals.

Arguments. Ross' negligence claim was advanced on three separate theories. First, Ross argued that Creighton was guilty of educational malpractice by failing to provide him with a "meaningful education" (Ross, 1992, p. 412) as well as failing to prepare him for future employment. Second, Ross claimed that he was negligently exposed to emotional distress as a result of being enrolled in a university for which he was not prepared and because Creighton failed to provide him with remedial assistance. Ross' final negligence claim created a new tort theory of negligent admission, in which an institution would be liable for admitting but not adequately assisting a "woefully unprepared student" (Ross, p. 412).

Ross also advanced a contract claim in which he argued that Creighton breached its contractual obligation to provide him "an opportunity . . . to obtain a meaningful college education and degree" (Ross, 1992, p. 412). Ross argued that this breach was evident by Creighton's failure to provide adequate tutoring, failure to mandate tutoring sessions for Ross, and failure to provide him a red-shirt season.

Decision/rationale. The District Court dismissed each of Ross' negligence claims. In an attempt to predict how the Illinois Supreme Court would rule on these claims, the District Court first determined that Illinois would not recognize the tort of educational malpractice. The court based this ruling on three factors: (a) the difficulty in identifying required duties and proximate cause in education disputes; (b) the fact that education is an inherently collaborative process, requiring effort from all parties involved; and (c) the possibility of inundating the court system with a wave of educational malpractice claims. Next, the court determined that Ross' claim of emotional distress did not adhere to any of the stated criteria necessary for an emotional distress claim under Illinois law. Finally, the court rejected Ross' negligent admission claim because it would place an undue burden on institutions as well as significantly reduce the admission possibilities for marginal students. The court felt universities would become reluctant to admit academically disadvantaged students if they faced potential tort damages for having done so negligently.

While agreeing that a contractual relationship exists between a student and a university, the District Court ruled that Creighton did not breach that contract. Ross' claims of inferior instruction and tutoring point to the quality of the education Creighton provided Ross, and this "cannot be attacked on contractual grounds" (Ross, 1990, p. 1331). The court qualified its ruling by stating that a breach of contract claim could be valid if a "specific contractual promise" (Ross, p. 1331) was broken by the institution. In this case, however, the court determined that Creighton delivered on its promises, and Ross' claims would lead to subjective interpretation of educational quality and unnecessary supervision of intercollegiate athletics by the courts.

The Court of Appeals agreed with the District Court's analysis of Ross' negligence claims and affirmed their dismissal. However, the Court of Appeals reversed the District Court's dismissal of Ross' contract claim and remanded it to the District Court for further proceedings. The Court of Appeals concurred with the District Court ruling that an allegation of an inferior education, without identification of a specific contractual promise breached by the defendant, is not sufficient to state a breach of contract claim. Where the Court of Appeals disagreed with the District Court was in the interpretation of Ross' claim. The Court of Appeals stated that Ross did, in fact, allege more than Creighton's failure to provide him with a quality education.

Ross claimed that the university was aware that his academic deficiencies would preclude him from participating in Creighton's academic program. Nevertheless, Creighton "made a specific promise that he [Ross] would be able to participate in a meaningful way in that program because it would provide certain specific services to him" (Ross, 1992, p. 417). Ross alleged that these services were not provided, which effectively eliminated him "from *any* participation in and benefit from the university's academic program" (Ross, p. 417). The Court of Appeals stated that the resolution of Ross' claims did not require an inquiry into the quality of Ross' education, as the District Court stated, but rather, a determination as to whether Ross was provided "any real access" (Ross, p. 417) to Creighton's academic program. The Court of Appeals determined that these narrow claims stated by Ross could be adjudicated by the District Court on remand.

Soderbloom v. Yale  
University (1992)

Facts. Members of the Yale University wrestling team sought a preliminary injunction enjoining Yale University from eliminating its varsity wrestling program. The plaintiffs claimed that the termination of the wrestling program constituted a breach of contract on the part of the defendant university.

Arguments. The defendants' argument that the plaintiffs' request for injunctive relief be denied was three-fold. First, Yale argued that no contractual agreement existed between the parties which guaranteed the

plaintiffs a varsity wrestling program. Additionally, the defendants maintained that courts had not been applying contract law to cases involving students and universities. Lastly, because injunctions are designed to maintain the status quo, the defendants argued that the plaintiffs' request for injunctive relief was inappropriate. Specifically, the defendants maintained that they announced the elimination of the wrestling program in April 1991, and the plaintiffs filed suit in November 1991, effectively seeking a restoration, not a continuation, of the program.

The plaintiffs, on the other hand, argued that the wrestling program was not terminated until as late as November 15, 1991, after the 1991-1992 season had begun. Therefore, according to the plaintiffs, they were seeking an injunction to merely maintain the status quo. Regarding the breach of contract claim, the plaintiffs argued that various university bulletins, as well as letters and conversations with the head wrestling coach, clearly constituted contractual obligations to maintain a wrestling program.

Decision/rationale. While acknowledging that a contractual relationship exists between a student and a private educational institution, the Superior Court of Connecticut noted that "courts have been reluctant to apply strict law concepts" (Soderbloom, 1992, \*4) to these relationships. The plaintiffs would, however, have a valid claim if they were able to identify specific contractual promises breached by the defendants. The court therefore



examined the university publications and correspondence from the coach in which the alleged contractual promises were present.

The court ruled that Yale's publications consistently "emphasized that its primary function is educational and that extracurricular activities are subject to modification" (Soderbloom, 1992, \*8). The wrestling coach's letters clearly placed primary emphasis on Yale's academic benefits as well, subordinating the role of the wrestling team. After examination, the court found no existence of a contract compelling Yale to maintain a varsity wrestling program throughout the plaintiffs' careers at Yale. In light of this ruling, which would prevent the plaintiffs from prevailing in a trial on the merits, the request for a temporary injunction was denied.

McRae v. Sweet (1991)

Facts. In January, 1991, Syracuse University began an internal investigation of its men's basketball program which led to the discovery of three National Collegiate Athletic Association (NCAA) rules violations relating to the recruitment of one of its current players, Conrad McRae. Upon each violation discovery, Syracuse declared McRae ineligible and appealed to the NCAA to reinstate his eligibility. The NCAA denied Syracuse's third request and, after rejecting the university's appeal, declared McRae permanently ineligible to play basketball for Syracuse in December 1991.

Two days after the NCAA's declaration, McRae filed suit against Syracuse University and the NCAA seeking a permanent injunction enjoining the

defendants from revoking his participation eligibility. The New York State Supreme Court (Onondaga County) issued a temporary restraining order which prevented the defendants from withholding McRae's participation opportunity. The defendants jointly removed the case to federal court and moved for an order to vacate the temporary restraining order issued by the state court.

Arguments. The defendants argued that federal courts had jurisdiction in this case based on McRae's claims that he was denied procedural and substantive due process, as guaranteed under the Fourteenth Amendment of the United States Constitution. McRae claimed that the suspension and failure to restore his eligibility constituted a deprivation of "unique property and liberty interests for which there is no adequate remedy at law" (McRae, 1991, \*8) and for which due process is required.

Decision/rationale. The United States District Court for the Northern District of New York first addressed the question of federal jurisdiction over the subject matter of this case. Although McRae's Fourteenth Amendment claims appeared to pose a federal question, the court noted that a claim should be dismissed from federal court "if it is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as to not involve a federal controversy'" (McRae, 1991, \*8). The District Court determined this to be the case with McRae's federal due process claims.

The District Court stated that for McRae to succeed on his Fourteenth Amendment claims, he would have to demonstrate that he was denied due process in the revocation of a protected interest by a state actor. The court cited case law which clearly declared that the NCAA is not liable under the due process clause of the Fourteenth Amendment because it is not considered a state actor. The court further noted that the United States Supreme Court had ruled that a private institution such as Syracuse is not considered a state actor unless the state coerces or significantly encourages the institution's decisions. The District Court determined that this type of relationship did not exist between Syracuse University and the state of New York.

Accordingly, the District Court ruled that McRae's federal due process claims were insubstantial and unworthy of federal adjudication. Because of this fact, the District Court lacked jurisdiction in this case and was unable to rule on the defendants' request to vacate the temporary restraining order. As a result, the defendants' motion to vacate was denied and the case was remanded to the New York Supreme Court.

Jackson v. Drake  
University (1991)

Facts. In 1988, Terrell Jackson was recruited to play basketball at Drake University by the newly hired head basketball coach Tom Abatemarco. While recruiting Jackson, Abatemarco emphasized that Jackson would receive a quality education as well as become the player around whom Drake's basketball program would be structured.

Jackson was provided an academic tutor when he enrolled at Drake but Abatemarco scheduled practices during Jackson's designated study time and tutoring appointments. Jackson's scholarship was threatened to be revoked if he did not attend these practices. Furthermore, the coaching staff wrote term papers for Jackson and recommended he take non-challenging courses to ensure he would maintain his eligibility. Jackson refused the term papers and selected his own courses. Additionally, Abatemarco required Jackson to do extra drills in practice and addressed him using derogatory and offensive names.

In January 1990, Jackson quit the basketball team and subsequently filed suit against Drake on six counts: (a) breach of contract, (b) negligence, (c) negligent misrepresentation, (d) fraud, (e) negligent hiring, and (f) violation of civil rights. Drake removed the case to the United States District Court for the Southern District of Iowa and filed a motion for summary judgment.

Arguments. Jackson's breach of contract claim is grounded in his belief that his financial aid agreements guaranteed a right to an educational opportunity as well as a right to participate in basketball. Jackson argued that this contract was breached by Drake's failure to provide him adequate academic counseling, tutoring, and study time as well as a disregard for Jackson's progression toward earning a degree. Drake argued that the only

contractual agreements it had with Jackson were his financial aid agreements with which the university had fully complied.

Jackson next argued that Drake was negligent in its duty to provide "an atmosphere conducive to academic achievement" (Jackson, 1991, p. 1493). Drake countered that Jackson's negligence claim was nothing more than an educational malpractice claim which is clearly not recognized under Iowa law.

Jackson cited negligent misrepresentation and fraud with regard to statements made by Abatemarco. Jackson argued that Abatemarco promised Jackson access to all available academic support services enabling him to receive a college education while competing in basketball. Drake argued that these claims could not be recognized because they were also educational malpractice claims.

Jackson next claimed that Drake had a duty to hire a coach who would place the emphasis on academics that is conveyed by the university and one who would abide by NCAA regulations. According to Jackson, Drake's hiring of a "coach who had a reputation for underhandedness, academic impropriety, and player abuse" (Jackson, 1991, p. 1495) made them liable for negligent hiring.

Jackson's civil rights claim falls under Section 1981 of Title 42 of the United States Code, which prohibits racial discrimination in the execution and enforcement of an employment contract. Jackson claimed "that Drake,

through Abatemarco, intentionally threatened to revoke his scholarship, physically and mentally abused him, humiliated him and de-emphasized his education" (Jackson, 1991, p. 1495). An African-American, Jackson claimed this abuse was race-based and prevented the enforcement of his contract with the university.

Decision/rationale. The District Court granted Drake's motion for summary judgment on all counts except the charges of negligent misrepresentation and fraud, which were initially denied. Jackson's breach of contract claim was dismissed because the court determined that the only contractual obligations Drake incurred was to honor its financial aid agreements. Drake satisfactorily met all of its obligations under the financial aid agreements which included no guarantee for Jackson to play basketball. Likewise, Jackson's negligence claim was dismissed because the court agreed with Drake that Jackson's claim was so similar to previous claims of educational malpractice that it would not be recognized by the Iowa Supreme Court. The District Court then ruled that Jackson failed to present a genuine issue of negligent hiring by Drake. Absent one unfavorable magazine article about Abatemarco, the plaintiff was unable to produce specific facts which would point to Drake's negligence in hiring Abatemarco.

The court did, however, recognize that Jackson relied on false information supplied by Drake's agent in reaching his decision to attend Drake University. The court ruled that there were enough facts to suggest that

this information was supplied knowingly to Jackson with the intent to induce him to attend Drake. These facts led the court to deny Drake's request for summary judgment on Jackson's claims of negligent misrepresentation and fraud. Upon reconsideration, however, the court ruled that negligent misrepresentation is only applicable if the plaintiff uses false information received from the defendant in a transaction with a third party. Since this was not the case with Jackson, Drake's motion for summary judgment on the claim of negligent misrepresentation was later granted.

Phillips v. All American  
Life Insurance Co. (1991)

Facts. The plaintiff in this case suffered a pulmonary embolism, allegedly resulting from an injury sustained while participating on a San Jose State University athletic team. Phillips initially filed suit against various insurance companies and underwriters as well as the National Association of Collegiate Directors of Athletics alleging breach of contract, negligence, and insurance bad faith for unpaid insurance proceeds.

The defendants removed this case from a California Superior Court to the United States District Court for the Northern District of California because of jurisdiction diversity. Phillips then amended his complaint to add San Jose State, California State University, and the State of California as named defendants. Because of the added State defendants, the plaintiff moved to remand this case to a California Superior Court. The defendants subsequently filed a motion for summary judgment.

Arguments. Phillips argued that the State defendants were liable for breach of contract and negligence and that their inclusion as defendants destroyed federal court jurisdiction. The State defendants argued that "the plaintiff must exhaust his State administrative remedies prior to obtaining judicial relief" (Phillips, 1991, \*3) and, therefore, they were entitled to summary judgment.

Decision/rationale. This case was simply a hearing to rule on the plaintiff's motion for remand and the defendants' motion for summary judgment. The District Court ruled that the plaintiff amended his complaint to include the State defendants in a timely manner and as a result of a bona fide complaint. Therefore, the District Court ruled that it lacked subject matter jurisdiction, preventing an evaluation of the defendants' summary judgment motion, and remanded the case to the California Superior Court for the County of Santa Clara.

Lesser v. Neosho County  
Community College (1990)

Facts. Michael Lesser was recruited by the head baseball coach at Neosho County Community College (NCCC), Steve Murry, to play baseball for the two-year community college in Chanute, Kansas. During the recruiting process, Murry informed Lesser that, if he were to play at NCCC, he would be required to get a haircut, not be allowed to wear an earring, and be housed in a comfortable, two-person dorm room. Murry did not inform Lesser that he could be cut from the team or of the existence of the team's



written and unwritten rules which were enforced through a monetary fine system.

On April 29, 1988, Lesser signed a letter of intent to attend NCCC. In accordance with the letter of intent, NCCC agreed to pay for Lesser's books in the Fall semester and books and tuition in the Spring semester. The letter of intent made no guarantees to Lesser as to his participation on the baseball team.

Upon his arrival at NCCC in the Fall of 1988, Lesser was assigned to a four-person dorm room that was a converted recreation room. He was also told by members of the baseball team that his hair, which he had previously cut, was still too long and would need trimming. Lesser subsequently consented to receive a crewcut from a student assistant on the baseball team. At the first team meeting, Murry distributed a list of team rules and also stated that there were various unwritten rules that were enforced as needed. Murry then stated that, in past seasons, a violation of a team rule resulted in a one dollar fine. No players objected to the implementation of the fine system. Team members were then told that they could appeal any fine to a "kangaroo court" made up of players appointed by Murry. Lastly, Murry stated that player cuts would be made after the fourth practice to reduce the roster size.

During the first four practices, Lesser was fined four dollars for violating the written rule of being unshaven, and three unwritten rules: (a) wearing a

bracelet; (b) a wrong place, wrong time violation; and (c) failure to wear a protective cup. Lesser's protective cup violation was discovered during one of Murry's "cup checks." During these "checks," Murry would line up the team and proceed down the line tapping each player in the genital area with a bat to ensure he was wearing a protective cup. Lesser was told by another player to inform the coach if he was not wearing a cup and he would not be touched. Lesser did so, and was assessed a one dollar fine.

Lesser, a pitcher/outfielder, was evaluated during the first four practices by the team's assistant coach. Upon recommendation from the assistant coach, Murry cut Lesser from the team on August 22, 1988. Lesser immediately disenrolled from NCCC and began a lengthy eligibility battle.

On January 6, 1989, Lesser filed suit against NCCC and Coach Murry alleging; (a) breach of contract, (b) deprivation of liberty interests without due process, (c) deprivation of property interest without due process, (d) fraud by concealment, (e) fraudulent misrepresentation, (f) assault, and (g) battery. The defendants filed a motion for summary judgment.

Arguments. Lesser argued that his elimination from NCCC's baseball team was a breach of the contractual obligations agreed to in the letter of intent. Lesser claimed that the letter of intent formed a contractual agreement obligating him to play baseball for NCCC and, in return, NCCC would provide him with a scholarship. The defendants argued that the letter of

intent only promised Lesser a scholarship, which was provided, and in no way guaranteed a position on the baseball team.

Lesser maintained that the defendants violated the due process clause of the Fourteenth Amendment of the United States Constitution by depriving him of liberty and property interests. Lesser argued the team's restrictive dress and appearance rules constituted a deprivation of liberty interests and the team's fine system deprived him of property interests. The defendants argued that Lesser waived his right to contest any deprivation of constitutional rights by accepting, albeit tacitly, the team rules. The defendants further argued that, because participation in baseball is a voluntary activity, they need only to demonstrate a rational basis for the grooming and personal appearance rules.

Lesser argued that the defendants committed fraud by concealment when they failed to inform him that he could be cut from the baseball team, that there was a fine system for violation of team rules, and that he would be expected to maintain a military haircut. The defendants argued that these issues were either disclosed to the plaintiff prior to him signing the letter of intent, or that they were not material facts in this case.

Lesser's claims of fraudulent misrepresentation arose from the defendants' promises of exposure to major college and professional scouts, individualized coaching, and two-person rooms. Lesser claims that these promises were made recklessly and were factors upon which he based his

decision to attend NCCC. The defendants argued that their conduct in recruiting the plaintiff was a discretionary function of the college which is protected from tort claims pursuant to the Kansas Tort Claims Act.

Lesser's battery claim is a result of the haircut he received from the student assistant. Lesser argued "that he was forced to submit, under duress, to having a military style haircut" (Lesser, 1990, p. 865) resulting in emotional distress and humiliation. The defendants countered that Murry neither directed nor had any part in the haircut incident. Rather, Lesser agreed to the haircut on the recommendation of other team members.

Lastly, Lesser testified that he experienced real "fear and apprehension of bodily harm" (Lesser, 1990, p. 865) as a result of Murry's "cup check." The defendants refuted this assault claim with the fact that Lesser had been told by another player that Murry would not strike him if he told the coach that he was not wearing a protective cup. Because of this fact, the defendants argued that the plaintiff could not possibly have feared bodily harm.

Decision/rationale. The United States District Court for the District of Kansas addressed the defendants' motion for summary judgment on each of the plaintiff's claims separately. The court granted the defendants' motion for summary judgment on Lesser's breach of contract claim. The court ruled that the "clear and unambiguous language" (Lesser, 1990, p. 865) of the letter of intent in no way guaranteed Lesser a spot on the baseball team roster. The only obligation incurred by the institution was to provide the

plaintiff with financial aid. The contract was properly executed as the college's obligation for financial aid was clearly fulfilled.

The court also rejected Lesser's claim that the defendants deprived him of a liberty interest by imposing dress and appearance standards. The court noted that "participation in intercollegiate athletics is a privilege and not a right" (Lesser, 1990, p. 861) and not protected by the due process clause. Therefore, those who voluntarily choose to participate in athletics are compelled to comply with the rules and regulations governing that particular activity.

The District Court was more sympathetic to Lesser's claims of deprivation of property interests without due process. The court determined that Lesser did not admit nor realize that he had violated team rules for which he was fined. Furthermore, the plaintiff was under the impression that an appeal to the "kangaroo court" was his only available recourse but that this route would prove futile. The court also discovered that Lesser was completely unaware of the college's student grievance process through which he could have appealed his fines. Therefore, the defendants' motion for summary judgment on the plaintiff's deprivation of property interest claim was denied.

Because each of Lesser's fraud by concealment claims were proven to either have been known to Lesser or immaterial to his decision to attend NCCC, the court granted the defendants' motion for summary judgment on

these claims. The haircut policy and the possibility of being cut from the team had been clearly communicated to the plaintiff. Additionally, Lesser testified that previous knowledge of the existence of a fine system would not necessarily have deterred him from attending NCCC. By law, "failure to disclose facts which do not substantially affect the transaction are immaterial" (Lesser, 1990, p. 864) and not able to be used as evidence of fraud by concealment.

The court found Lesser's claim of fraudulent misrepresentation to contain merit and denied the defendants' motion for summary judgment on this claim. The court ruled that Murry's statements regarding exposure to major college and professional scouts, individualized coaching, and two-person dorms were clearly untrue. Whether these statements were made with the intent to deceive the plaintiff or with a reckless disregard for the truth, elements necessary for fraudulent misrepresentation, was left unresolved by the court. The court ruled that these questions, together with determining the plaintiff's reliance on the defendants' misrepresentations, were best answered by a jury.

Lastly, the court dismissed Lesser's battery claim but denied summary judgment for the defendants on Lesser's assault claim. The court ruled that because Lesser consented to the haircut and the fact that Coach Murry had absolutely nothing to do with it, insufficient evidence was presented to raise a question of battery. The court did, however, determine that Lesser may

have truly experienced fear that Murry might strike him during the "cup check." Once again, the court ruled this to be a question of fact to be answered by a jury.

In summary, the District Court granted the defendants' motion for summary judgment on the plaintiff's claims of breach of contract, deprivation of liberty interests, fraud by concealment, and battery. Summary judgment was denied on Lesser's claims of deprivation of property interests, fraudulent misrepresentation, and assault.

#### Suits by Contractors

##### Texas Southern University v. Federal Sign (1994)

Facts. In 1988, Texas Southern University (TSU) began accepting contractors' proposals for the production and installation of scoreboards for their basketball arena. TSU also solicited corporate sponsorship to finance the new scoreboards. On February 3, 1989, TSU, Federal Sign, and the Pepsi-Cola Company agreed to terms of a proposal with a contract price of \$158,404. Several days after the agreement was reached, TSU officials verbally instructed Federal Sign to begin construction of the scoreboards. Relying on TSU's written acceptance of their proposal as well as the instruction to begin construction, Federal Sign commenced work.

On September 5, 1989, Federal Sign received a letter from TSU stating that its proposal was found to be unacceptable and that TSU would begin seeking another manufacturer. TSU then entered into a new agreement

with a different contractor for the construction of the scoreboards. On March 15, 1990, Federal Sign filed suit against TSU for breach of contract and sought \$67,481 in lost profits as well as \$22,840 in unrecoupable expenses. A jury found that TSU breached its contractual obligations and awarded Federal Sign \$67,481 in damages. TSU appealed the decision based on sovereign immunity.

Arguments. The university argued that the doctrine of sovereign immunity prohibited contract claims against the state. Additionally, TSU noted that "a suit against a state institution is a suit against the state" (Texas Southern University, 1994, p. 511) and therefore barred because of sovereign immunity as well. Accordingly, TSU, as a state institution, was protected from contractual claims.

Federal Sign argued that the Texas State Legislature had specifically waived the state's right to immunity from contractual suits with the passage of Section 106.38 of the Education Code. This section briefly describes the process and venue for filing suit against TSU. Federal Sign argued that the existence of this section amounts to legislative consent for TSU to be sued.

Decision/rationale. The Court of Appeals of Texas stated that a state waives its immunity from liability when it enters into a contract with a private citizen, but it does not waive its immunity from suit. The court noted that "the state, as sovereign, is immune from suit without consent even if there is no dispute regarding a state's liability" (Texas Southern



University, 1994, p. 511). In order for a state to be subject to suit, it must clearly and unambiguously waive its right to immunity. The court found no evidence that the state of Texas had done so in this case. The court stated that no language in Section 106.38 of the Education Code clearly expressed the state's intent to waive its immunity from suit. Without such a waiver, Federal Sign was prohibited from prevailing in a breach of contract claim against TSU. Therefore, the Court of Appeals reversed the trial court's verdict against TSU and remanded the case for dismissal.

## CHAPTER VI

### ANALYSIS OF TORT LIABILITY LITIGATION

#### Negligence--Supervision/Instruction

##### Kennedy v. Syracuse University (1995)

Facts. In March 1992, Russell Kennedy was participating in practice as a scholarship member of the Syracuse University men's gymnastics team. During a high bar routine Kennedy's hand grip failed, causing his wrist to become immobilized and fracturing both the ulna and radius in his right arm. Kennedy was immediately helped from the bar by coaches and teammates and given emergency first aid. No athletic trainers were present at the practice nor in the fieldhouse at the time of Kennedy's injury. Kennedy was, however, taken to the local hospital emergency room within thirty minutes of the mishap by a coach. The severity of Kennedy's injury required extensive surgery to repair the broken bones. Within days of the surgery, Kennedy suffered from excess swelling in the soft tissue of his wrist which required additional surgery to correct.

Kennedy filed suit against the Syracuse University claiming negligence on the part of the university, breach of contract, and breach of a voluntarily assumed duty. Syracuse University filed a motion for summary judgment.

Arguments. First, Kennedy argued that the university was negligent in failing to ensure an athletic trainer was present at all gymnastics practices. Additionally, Kennedy maintained that his injury was exacerbated by the emergency first aid he received. Before placing ice on the injury, one of Kennedy's teammates was required to remove the hand grip by tightening the straps to release the buckle and, according to Kennedy, this led to the swelling complications he experienced after the initial surgery.

Kennedy's breach of contract claim arises from the fact that he was a scholarship athlete at the university. Kennedy argued that Syracuse University possessed a contractual obligation to provide scholarship athletes with proper medical assistance, facilities, and trainers.

Lastly, Kennedy argued that Syracuse University had voluntarily assumed a duty to ensure a trainer was present at all practices of all varsity sports. The plaintiff maintained this was the case because the university had "adopted a custom and practice of providing trainers for all football and basketball practices" (Kennedy, 1995, \*10).

Syracuse University argued that it was entitled to summary judgment because Kennedy had failed to satisfy one element necessary to successfully state a negligence claim. The university presented evidence, through the testimony of a hand specialist, that there was no causal connection between their conduct and Kennedy's injury.

Decision/rationale. As outlined in Chapter II of this study, there are four elements which must necessarily be demonstrated to prove negligence. These elements are: (a) a duty owed to the plaintiff by the defendant, (b) a breach of that duty, (c) real damages or injuries suffered by the plaintiff, and (d) a causal connection between the defendant's breach and the plaintiff's injury. The United States District Court for the Northern District of New York found that the first three elements were present, but that Kennedy failed to demonstrate the fourth. Specifically, the court stated that the university may have, in fact, failed to provide the required standard of care for Kennedy, but found no evidence to suggest that these "acts or omissions of the university, and its agents, were the proximate cause of his injury" (Kennedy, 1995, \*6). Because Kennedy assumed the risk of the initial injury and no evidence suggested that the emergency first aid or non-availability of a trainer caused additional injury, the court granted the university's motion for summary judgment on Kennedy's negligence claim. Likewise, the court cited the absence of causation as grounds to grant the university summary judgment on Kennedy's breach of contract and breach of assumed duty claims. Accordingly, the court then dismissed Kennedy's complaint in its entirety.

Sicard v. University of  
Dayton (1995)

Facts. As a scholarship basketball player at the University of Dayton, Alfred Sicard was required to lift weights as part of the team's conditioning

program. On October 4, 1992, Sicard was attempting to bench press 365 pounds and allegedly requested the assistance of three spotters. One of the spotters was Dave Bollwinkle, a university employee who worked with student-athletes in the weight training program. Sicard failed on his attempted lift and required help from the spotters to prevent the weight from falling on his chest. Two of the spotters attempted to lift the weight, but Bollwinkle had turned away to speak with another party and failed to lift his end of the bar. Consequently, the weight crashed to Sicard's chest and ruptured his left pectoral muscle.

Sicard filed suit against Bollwinkle and the University of Dayton claiming that Bollwinkle's wanton and reckless misconduct was the proximate cause of his injury. The defendants filed a motion for summary judgment arguing that Bollwinkle's conduct constituted no more than simple negligence. They maintained that Sicard was required to demonstrate intentional or reckless misconduct on the part of Bollwinkle if he was to recover for injuries sustained while participating in a recreational activity. The trial court agreed with the defendants and entered summary in favor of Bollwinkle and the university. Sicard appealed and forwarded three assignments of error.

Arguments. Sicard argued that the trial court erred in not finding genuine questions of material fact on three issues: (a) whether Bollwinkle was acting within the scope of his employment at the university, (b) whether

Bollwinkle had agreed to spot Sicard, and (c) whether Bollwinkle's act of omission constituted wanton or reckless misconduct.

Decision/rationale. The Court of Appeals of Ohio for the Second Appellate District confirmed that Sicard was engaged in a recreational activity at the time of the injury and was therefore protected from intentional or reckless misconduct. The court further noted that spotters owe weight lifters a standard of conduct that does not create "an unreasonable risk of physical harm" (Sicard, 1995, \*5). The court found that weight lifters assume the risk of injuries from the stress of lifting massive weights, but do not express "a willingness to submit to injury from falling weight" (Sicard, \*7). Spotters are utilized in weight lifting to prevent such injuries. The court then commented on the standard of conduct expected of a spotter:

A spotter who intentionally fails to provide the assistance necessary to avoid injuries from falling weights may be found to have engaged in a reckless act or omission if he knows or should know that the failure creates an unreasonable risk of physical harm to the weight lifter.

(Sicard, 1995, \*7)

The court ruled that a genuine issue of material fact existed as to whether Bollwinkle's conduct was reckless because it exposed Sicard to an unreasonable risk of physical harm. Accordingly, the court reversed the trial court's entry of summary judgment in favor of the defendants and remanded the case for trial.

There was, however, a dissenting opinion in this case. Judge Fain characterized Bollwinkle's conduct as that of "momentary inattention" (Sicard, 1995, \*10) which was "classic negligence, not recklessness" (Sicard, \*11). Fain stated he would affirm the trial court's summary judgment in favor of Bollwinkle and, because the university's liability was derived through the actions of Bollwinkle, he would affirm summary judgment for the University of Dayton as well.

Kyriazis v. University of  
West Virginia (1994)

Facts. In February 1990, Jeffrey Kyriazis joined the rugby club at the University of West Virginia (UWV). Kyriazis was a sophomore at the university and had never participated in rugby prior to joining the club. At one of the early practices, all team members were required to sign a "release, waiver, and participation agreement" (Kyriazis, 1994, p. 651) in which they acknowledged risks inherent in rugby, released UWV from liability for injuries, and waived their right to file claims against the university or its agents. Only students involved in selected club sports were required to sign participation waivers and UWV did not require waivers from students participating in intramural sports.

On April 7, 1990, Kyriazis suffered a basilar-artery thrombosis while participating in his first rugby match. In April 1992, Kyriazis filed suit against UWV, the UWV Board of Trustees, the rugby club, and the rugby coach seeking damages in the amount of the defendants' liability insurance

coverage. Kyriazis filed a motion for summary judgment and the defendants filed cross-motions for summary judgment claiming that the release Kyriazis signed was "an absolute bar to suit and that the university owed no duty to [Kyriazis]" (Kyriazis, 1994, p. 653). The trial court granted the defendants' motion for summary judgment and Kyriazis appealed.

Arguments. Kyriazis argued that the trial court erred in denying his motion for summary judgment because: (a) requiring students to sign a release is contrary to public policy; (b) requiring releases from participants in certain club sports and not from participants in intramural sports is a violation of equal protection principles contained in both the West Virginia and the United States Constitutions; and (c) the release was developed, approved, and implemented in violation of UWV policy by people who lacked the "authority to do so" (Kyriazis, 1994, p. 653).

Kyriazis maintained that an exculpatory clause is contrary to public policy if it exempts a party who provides a public service from liability claims. He argued that UWV clearly provided a public service and the release was therefore contrary to public policy. On the other hand, the defendants argued that a recreational activity such as rugby was not an essential public service provided by the university. Furthermore, they maintained that Kyriazis voluntarily entered into the exculpatory agreement.

As to Kyriazis' equal protection claims, he argued "that the Board of Trustees cannot constitutionally require students participating in club sports



to sign a release when it does not require students participating in intramural sports to do the same" (Kyriazis, 1994, p. 656). The defendants countered by arguing that the release was required for three legitimate reasons. First, because of the university's limited sponsorship of club sports, it was unnecessary to provide comprehensive safeguards for students involved in club sports. Secondly, the release was necessary to protect the Board of Trustees and other university officials from liability. Lastly, the release acted as a warning to students of the potential physical dangers associated with participation in rugby.

Kyriazis' final argument was that the release was invalid because the entire release policy was developed without the involvement of the Board of Trustees. University policy dictated that the Board had responsibility for all university affairs.

Decision/rationale. The Supreme Court of Appeals of West Virginia agreed with the plaintiff's contention that a release may violate public policy if it exempts an institution performing public service from liability. Therefore, the court examined whether a recreational activity such as rugby is a public service when it is sponsored by a state university. The court determined that a state university providing recreational activities for its students is fulfilling its educational mission which is clearly a public service. So while the activities themselves may not constitute a public service, the sponsorship of these activities by a state university does. The court further stated

that the release violated public policy because of the unequal bargaining positions between the parties entering into the agreement. A student who wished to participate on the rugby club had no choice but to sign the release, clearly demonstrating that the university had a "decisive advantage in bargaining strength" (Kyriazis, 1994, p. 655) over the plaintiff. Because of the above reasons, the court ruled that the release was void as a matter of public policy.

The court then addressed the equal protection claim of Kyriazis. The court stated that equal protection guarantees prohibit the treatment of "similarly situated people differently unless circumstances justify the disparate treatment" (Kyriazis, 1994, p. 656). The court noted that only certain club athletes at UWV were required to relinquish their legal rights before being allowed to participate. The court ruled that the disparate treatment of intramural and club athletes was not justified under equal protection principles. Therefore, the court ruled that the release was invalid because it violated West Virginia equal protection guarantees.

The court then refused to address Kyriazis' final claim that the adoption of the release policy was invalid because it violated university procedures. The court stated that because there were other factors which rendered the release invalid, this question need not be addressed. Additionally, the court commented briefly on the fact that the defendants' contention that Kyriazis

assumed the risks associated with rugby was a matter to be determined by a jury.

In summary, the court ruled that the release signed by Kyriazis was invalid because it violated public policy and equal protection. Accordingly, the trial court's decision for summary judgment was reversed and the case remanded for further proceedings.

Fisher v. Northwestern State  
University (1993)

Facts. Jennifer Fisher was a varsity cheerleader for Northwestern State University in Louisiana. On October 3, 1990, she and her partner, Scott Simmons, were attempting a stunt in which Simmons holds both of Fisher's feet in his right hand with his arm extended above his head. As Simmons attempted the stunt, Fisher fell to the ground and broke her left ankle.

Fisher filed suit against Northwestern State for its failure to supervise cheerleading practices. The trial court ruled that Northwestern State was 65% at fault and Fisher was 35% at fault for her own injuries. The court awarded Fisher \$74,448.50 in damages and the university appealed.

Arguments. Fisher's argument was that the university was liable for her injury because it failed to provide adult supervision at cheerleading practices. She maintained that a competent supervisor would have prohibited Simmons from attempting the stunt with Fisher until both were more competent in the required skills. This would have prevented her from suffering

an injury while attempting a stunt which was well beyond the capabilities of her partner or herself.

The university argued that all cheerleaders at Northwestern State are selected through a tryout process and participation is voluntary. The university demonstrated through testimony of other cheerleaders that there is a clear understanding and even an expectation of exposure to physical risks in collegiate cheerleading. The defendant argued that all their cheerleaders had attended camps where proper safety procedures were taught, that they used spotters in practices, and that they had two student captains who actively controlled all practices. The university further noted that only three of the fourteen universities in Louisiana had cheerleading coaches because they were simply not necessary "for the average university squad" (Fisher, 1993, p. 1311). Most institutions utilized cheerleading advisors who were responsible for the administrative duties of the squad.

Decision/rationale. The Third Circuit Court of Appeal of Louisiana ruled that a relationship clearly existed between the university and Fisher, but questioned the extent of the duty that Northwestern State owed its cheerleaders. The court noted that "the law requires only that supervision be reasonable and commensurate with the age of the student and the attendant circumstances" (Fisher, 1993, p. 1311). Through this analysis, the court determined that no duty existed on the part of the university to provide an adult supervisor at all cheerleading practices. For the reasons argued by the

defendants, the court found that college cheerleaders were as capable of determining what stunts were reasonable to attempt as any adult supervisor would have been. The court found that Northwestern State provided reasonable supervision to its cheerleaders and had no duty to provide an adult coach. Accordingly, the court reversed the trial court's judgment and dismissed Fisher's suit.

Additionally, the court found an inconsistency in the trial court's ruling. By finding Fisher 35% at fault, the trial court held her accountable for her actions, but held the university accountable for the fault of her partner. Following Fisher's argument that her injury was a result of the lack of supervision, the court maintained that the university "should have been held responsible for the entire damage, or none at all" (Fisher, 1993, p. 1310).

There was also a dissenting opinion in this case. Judge Saunders stated that the trial court correctly applied the principles of comparative negligence when it found Fisher to be 35% at fault and the university 65% at fault. Saunders felt the responsibility for the lack of supervision was accurately assigned to Northwestern State. Saunders stated that the trial court's judgment should have been affirmed.

Nova University, Inc.  
v. Katz (1993)

Facts. Sandi Katz, a cheerleader at Nova University, suffered a severe foot injury from a fall in cheerleading practice. She filed suit against the university claiming the coach negligently supervised the cheerleaders by

failing to require spotters for the stunt in which Katz was injured. A jury found Nova University negligent and awarded Katz an unspecified amount in damages. Nova University appealed the jury's verdict.

Arguments. Nova University argued that Katz's "claim should have been barred by the doctrine of express assumption of risk" (*Nova*, 1993, p. 729). The university claimed that Katz knowingly and voluntarily assumed the risks inherent in collegiate cheerleading. The university further argued that the trial court erred in denying a continuance of the original trial that would have delayed the verdict until Katz's foot had healed. Nova University maintained that a determination of future damages before a "final diagnosis and prognosis of the injury" (*Nova*, p. 730) could be made was inappropriate.

Decision/rationale. The Fourth District Court of Appeal of Florida first addressed Nova University's assertion that Katz's claim was barred by the doctrine of assumption of risk. The court stated that the assumption of risk doctrine "was narrowly drawn to protect other participants in contact sports from unwarranted liability for injuries due to bodily contact inherent in the sport" (*Nova*, 1993, p. 730). The court found that Katz's decision to voluntarily attempt a stunt without the aid of a spotter could be characterized as an assumption of risk. However, the court stated that while Katz voluntarily exposed herself to known risks inherent in cheerleading, she did not assume the risks created by improper supervision. As the court declared, "she did

not absolve the school of its responsibility for proper instruction and to properly supervise the activity" (Nova, p. 730). Therefore, the court found that the jury correctly applied the doctrine of comparative negligence to "weigh the reasonableness of [Katz's] activity against the school's negligence" (Nova, p. 730).

The court next addressed the defendant's claim that the trial court erred in denying its motion for a continuance. The court found that expert testimony was used at the original trial to determine Katz's long-term prognosis and that the defendant failed to conduct a second evaluation on the plaintiff's injury as was authorized by the trial court. Without a second evaluation, the court looked unfavorably on the university's argument that it was impossible to evaluate the permanency of Katz's injury at the time of the trial. In accordance with the above rulings, the appellate court affirmed the jury's verdict that Nova University was negligent in its supervision of its cheerleaders.

Lennon v. Petersen (1993)

Facts. Patrick Lennon was a scholarship soccer player at the University of Alabama at Huntsville (UAH) when he began experiencing sharp pains in his groin and hip. Lennon reported the pain to the team's athletic trainer, Debbie Lee, who determined the source of Lennon's pain to be a groin strain. Lee treated Lennon's injury with ice and electrical stimulation throughout the soccer season but Lennon's pain persisted. Lennon

consulted a physician who determined that Lennon was suffering from avascular necrosis. Lennon subsequently underwent two surgeries to correct the problem although it could not be determined if Lennon would experience premature arthritis or require a hip replacement at a later date.

Lennon filed suit against Lee and the head soccer coach, Carlos Petersen. Lennon alleged that both individuals acted negligently and, as a result, "he was injured and damaged" (Lennon, 1993, p. 172). The defendants filed a motion for summary judgment which was entered in their favor by the trial court on the basis of discretionary function immunity. Lennon appealed the summary judgment.

Arguments. Lennon argued that neither Petersen nor Lee were entitled to discretionary immunity because both had exceeded the scope of their authority as granted them by the university and the state. Lennon alleged that Petersen acted beyond his authority when he repeatedly "discouraged players from seeking treatment for their injuries" (Lennon, 1993, p. 173). According to Lennon, Lee exceeded her authority by practicing medicine on him without a license. Lennon maintained that neither Petersen nor Lee were performing discretionary duties inherent in their positions when they dealt with Lennon's injury.

Petersen and Lennon argued that they were entitled to discretionary immunity as a matter of law. They maintained that they were protected



from suit arising from discretionary decisions and actions necessary in the performance of their duties.

Decision/rationale. Although the Supreme Court of Alabama noted that a clear definition of a "discretionary function" does not exist, the court found that the defendants' actions clearly fell "into the category of discretionary acts" (Lennon, 1993, p. 174). Petersen was hired by UAH to coach soccer and was therefore given the authority to make discretionary judgments and decisions necessary to effectively manage his program. The court found that Petersen was often required to make difficult determinations regarding the nature and extent of player injuries.

The court determined that Lee was also required to "use her discretion and judgment" (Lennon, 1993, p. 175) in the performance of her duties. She was required to evaluate the extent of players' injuries and prescribe a treatment protocol. Additionally, she had the responsibility of determining a player's capacity to compete with an injury, to monitor the player's rehabilitation program, and to refer players to a physician when necessary. The court found that all of these duties were well "within the scope of an athletic trainer's license" (Lennon, p. 175). The fact that Lee was unlicensed at the time of Lennon's injury was irrelevant because Alabama did not require certification of athletic trainers at the time this claim was filed. Because all of these duties imposed on an athletic trainer required Lee to

exercise judgment and discretion, the court ruled that she was entitled to discretionary immunity.

The court ruled that Lennon was unable to demonstrate that Petersen and Lee acted beyond the scope of their authority and that both defendants' positions required extensive reliance on judgment and discretion. Therefore, the Supreme Court of Alabama affirmed the trial court's judgment that discretionary function immunity protected both defendants from suit.

Albano v. Colby College (1993)

Facts. The Colby College, Maine, tennis team took its annual spring break trip to Puerto Rico in March of 1989. The trip was a non-mandatory event for players who were required to pay for their own travel and lodging. After arriving in Puerto Rico, Albano's coach instructed all players to remain on the resort premises and to refrain from excessive alcohol consumption during free time. The drinking age in Puerto Rico was 18 years old.

On March 28, 1989, Eric Albano, a 20-year-old student-athlete at Colby College, began drinking heavily after tennis practice concluded in mid-afternoon. The coach had been aware that Albano was drinking as he had to break up a altercation between Albano and another student later that afternoon. After dinner, Albano and other team members went to a resort piano bar where they continued to drink. Later that evening Albano was separated from his party and was found unconscious the next morning. Albano had sustained severe head injuries but was unable to recall if they

were the result of a fall or of a confrontation with an assailant. Albano subsequently sued Colby College and its tennis coach for negligence. The defendants then filed a motion for summary judgment.

Arguments. Albano argued that the coach had a duty to prevent Albano from becoming excessively intoxicated. Albano also suggested that the coach incurred legal duties by creating "a relationship of dependence" (Albano, 1993, p. 842) when he instructed players to remain on the resort premises and to drink responsibly. Lastly, Albano argued that the coach had a legal duty to protect him "from the harm of a third-party assault" (Albano, p. 842).

Decision/rationale. The United States District Court for the District of Maine ruled that neither Colby College nor its coach had a legal duty to prevent the circumstances which led to Albano's injuries. The court found that the coach possessed no authority to prevent Albano's intoxication. The coach was not a law enforcement officer, Albano was of legal drinking age, and the coach had no power to evict Albano from resort establishments. The court determined that the only possible leverage the coach possessed over Albano was the threat of dismissal from the tennis team. However, in the view of the court, this "mere ability to control--assuming that the coach or Colby College had such an ability here--does not give rise to a legal duty" (Albano, 1993, p. 842). The court acknowledged that it may have been wise or helpful if the coach had encouraged Albano to stop

drinking, but he had no duty to do so. It was clear that the coach warned his players to refrain from drinking excessively, and Albano "voluntarily chose to ignore that warning" (Albano, p. 842). Accordingly, the court found no negligence on the part of Colby College or its tennis coach and granted their motion for summary judgment.

Lamorie v. Warner Pacific  
College (1993)

Facts. Douglas Lamorie was a scholarship basketball player at Warner Pacific College when he seriously injured his nose while playing football at his church on April 19, 1989. Lamorie underwent surgery and experienced extensive facial bruising and swelling to the point that one eye was nearly swollen shut. Lamorie's physician instructed him not to attend classes or participate in athletics until the first week in May when he was allowed to return to class and to his job as a gym monitor at the college. Lamorie was still prohibited from participating in any strenuous exercise and his coach, Dan Dunn, was well aware of this restriction. On May 11, 1989, Dunn approached Lamorie and requested that he participate in a basketball team scrimmage. Lamorie's nose had visible swelling, his face was discolored and his vision was still partially impaired. Nevertheless, Lamorie felt his scholarship would be jeopardized if he refused to play in the scrimmage so he agreed to participate. During the scrimmage, Lamorie was struck in the face by another player, reinjuring his nose and sustaining an eye injury.

Lamorie filed suit against Warner Pacific College and Dunn claiming Dunn acted negligently when he asked Lamorie to participate in the scrimmage. Lamorie argued that Dunn displayed a reckless disregard for Lamorie's condition and physician's orders and that "he knew or should have known that [Lamorie] would feel improperly pressured to play because of fears of losing his basketball scholarship" (Lamorie, 1993, p. 402). The defendants filed a motion for summary judgment which was granted as to Lamorie's eye injury but not for the reinjury of his nose. Lamorie appealed the summary judgment entry.

Arguments. Lamorie argued that summary judgment was inappropriate because Dunn had a duty to prevent his players from foreseeable injuries. Additionally, Lamorie argued that there was clear "evidence from which the jury could find that injury to the eye was foreseeable" (Lamorie, 1993, p. 402). The defendants disagreed arguing that the only foreseeable injury was further damage to Lamorie's nose. The defendants maintained that the eye injury was not foreseeable "because it was not in the 'general class of harms' that could reasonably have been anticipated from their conduct" (Lamorie, p. 402).

Decision/rationale. The Court of Appeals of Oregon focused its inquiry on the question of foreseeability. The court stated that "the actual sequence of events causing an injury does not have to be predictable in order for the injury to be foreseeable" (Lamorie, 1993, p. 402). To the contrary,

an injury is foreseeable if it can be classified into "the general category of risk" (Lamorie, p. 402) which can be reasonably anticipated. The court determined that a reasonable jury could find that Dunn should have known and anticipated that Lamorie's obvious condition increased his risk of suffering any number of injuries while playing basketball. Therefore, the court ruled that "a genuine issue of material fact as to the foreseeability" (Lamorie, p. 403) of Lamorie's injuries existed and summary judgment was inappropriate. Accordingly, the trial court's ruling was reversed and the case remanded for further proceedings.

Kleinknecht v. Gettysburg  
College (1992/1993)

Facts. Drew Kleinknecht was a twenty-year-old defenseman participating in off-season lacrosse practice at Gettysburg College on September 16, 1988. During a "six on six" drill, Kleinknecht suffered a cardiac arrest and collapsed. Players and coaches rushed to Kleinknecht's aid and summoned medical assistance. Although there was conflicting evidence as to the length of time before medical help arrived, it appears that approximately six or seven minutes elapsed before cardiopulmonary resuscitation (CPR) was begun on Kleinknecht and about ten minutes passed before an ambulance arrived. CPR, defibrillation, and heart-strengthening drugs were administered to Kleinknecht as he was transported to the hospital where he died within the hour. An autopsy and several post-mortem examinations failed to reveal any cardiac abnormalities which could have been the cause of

Kleinknecht's fatal arrhythmia. Within the 14 months prior to Kleinknecht's death he had been examined by two different physicians who had found him to be in excellent health and fit to compete in intercollegiate lacrosse.

Kleinknecht's parents filed suit against Gettysburg College claiming the college's negligence was "a legal cause of their son's death after he suffered cardiac arrest" (Kleinknecht, 1992, p. 450). The Kleinknechts claimed that the college owed their son a duty to have proper emergency procedures in place at all competitions and practices to provide prompt and adequate medical care in the event an athlete were to suffer a cardiac arrest. The Kleinknechts argued that the college breached this duty by: (a) failure to maintain written emergency procedures, (b) failure to ensure all coaches were certified in CPR, (c) failure to ensure trainers were present at practices who were certified in CPR, and (d) failure to provide adequate emergency communication equipment at practice sites.

Gettysburg College moved for summary judgment arguing that it did not have a duty to protect healthy young athletes from unforeseeable physical trauma such as Kleinknecht's heart attack. In the absence of such duty, the college claimed that it could not be held not liable for the lack of CPR-trained coaches and trainers or the failure to provide a more prompt medical response to Kleinknecht's cardiac arrest.

The United States District Court for the Middle District of Pennsylvania agreed with Gettysburg College. The court found that the probability of a

healthy college athlete suffering a heart attack to be so remote that it would not "place a duty upon the defendant to anticipate it and guard against its consequences" (Kleinknecht, 1992, p. 454). Furthermore, while the court agreed with the Kleinknechts that the college owed Drew a duty of medical care after he collapsed, it found that the college satisfied this duty with its response. This decision was based on the prior ruling that the college had no duty to protect players from the risks of a heart attack. Absent any duty for emergency medical procedures in the event of cardiac arrest, the college's emergency response to Kleinknecht's collapse was found to be reasonable by the court. The court entered summary judgment in favor of Gettysburg College and the plaintiffs appealed.

Arguments. The Kleinknechts focused most of their appeal on two basic arguments. First, they argued that the District Court erred when it determined that Gettysburg College had no duty to ensure emergency medical procedures were in place to protect its intercollegiate athletes from the risks of cardiac arrest during practice. The Kleinknechts forwarded three theories which, they contended, clearly establish a duty requiring the college to "establish preventive measures capable of providing treatment to student-athletes in the event of a medical emergency" (Kleinknecht, 1993, p. 1366). These theories were: (a) the existence of a special relationship between an educational institution and its student-athletes, (b) the foreseeability that an



athlete may suffer a heart attack during an athletic event, and (c) public policy considerations.

Second, the Kleinknechts argued that the District Court erred in finding the college's response to their son's collapse reasonable and in accordance with its limited duty. The plaintiffs maintained that the college's unplanned response was far short of fulfilling its duty which "required it to be ready to respond swiftly and adequately to a medical emergency" (Kleinknecht, 1993, p. 1369).

Gettysburg College argued that it was unreasonable to impose a duty on an institution to protect its athletes from an unforeseeable incident such as Kleinknecht's cardiac arrest. The college argued that not only was Kleinknecht's heart attack unforeseeable to its representatives, but to Kleinknecht's parents as well. This was evidenced by the fact that Kleinknecht's parents encouraged Drew to participate in athletics and "made their home a beehive of athletic activity" (Kleinknecht, 1993, p. 1371). They did so while making no attempt to learn CPR nor taking the necessary precautions to deal with the unexpected instance of cardiac arrest. In a thinly veiled attempt to underscore this point, the college's counsel stated, "Had physical activity at his parents' home produced Drew Kleinknecht's heart attack, he would be just as dead" (Kleinknecht, 1993, p. 1371).

Decision/rationale. The United States Court of Appeals for the Third Circuit first addressed Kleinknechts' contention that Gettysburg College had

a "legal duty to implement preventive measures assuring prompt assistance and treatment in the event one of its student-athletes suffered cardiac arrest while engaged in school-supervised intercollegiate athletic activity"

(Kleinknecht, 1993, p. 1365). In doing so, the court examined each of the three theories forwarded by the Kleinknechts which they argued established the college's duty. First, the court agreed that a special relationship exists between a college and its intercollegiate athletes which creates a duty of reasonable care. Kleinknecht was acting in accordance with that special relationship when he suffered his heart attack. He was not engaged in a private endeavor, but rather, "participating in a scheduled athletic practice for an intercollegiate team sponsored by the college under the supervision of college employees" (Kleinknecht, 1993, p. 1367). Therefore, the court determined that a special relationship existed between Kleinknecht and Gettysburg College at the moment of his cardiac arrest which imposed a duty of care on the college.

Second, the court stated that the nature and extent of the duty imposed on an institution is dependent upon the foreseeability of the "general type of risk" (Kleinknecht, 1993, p. 1369) rather than the probability of the occurrence of a specific event. The court found that "the occurrence of severe and life-threatening injuries was not out of the ordinary during contact sports" (Kleinknecht, 1993, p. 1370) and the college's failure to protect against them was unreasonable. Therefore, the court ruled that in this

particular case, Gettysburg College owed a duty to Kleinknecht to have established emergency medical procedures which would provide prompt and adequate treatment to athletes who may have suffered a life-threatening injury.

Lastly, the court determined that public policy also dictated that the college owed a duty of care to Kleinknecht. The court cited the Pennsylvania Supreme Court which had held that the concept of duty is no more than the sum total of public policy considerations which have developed into laws to protect plaintiffs. Because there had already been two theories forwarded which clearly established the fact that the college owed Kleinknecht a duty of care, the court felt that was sufficient to also establish a duty based on public policy.

Once the court established that a duty of care was owed to Kleinknecht, it next addressed the plaintiffs' argument that the college's response to their son's collapse was unreasonable and a breach of its duty. The Third Circuit Court noted that the District Court's ruling which held that the college did not breach its duty to Kleinknecht was based on its previous judgment that no "duty of care to provide prompt and adequate medical assistance" (Kleinknecht, 1993, p. 1373) for cardiac arrest existed. Therefore, it was evident to the District Court that no breach of duty occurred and the college acted reasonably in its response to the emergency situation. However, the Circuit Court ruled that a duty of care did, in fact, exist and the extent to

which the college fulfilled its duty was a question of fact for a jury to address on remand.

The court also rejected the college's alternate claim that it was immune from prosecution under the Pennsylvania Good Samaritan law. The Good Samaritan law encourages qualified individuals to provide assistance at emergency scenes. The court determined that the Good Samaritan law applied to individuals only and that corporations and institutions would not enjoy statutory protection.

In summary, the Circuit Court reversed the District Court's summary judgment in favor of Gettysburg College. The court ruled that the college did have a duty to provide Kleinknecht with prompt emergency medical care and that it may have breached that duty with its actions. The case was remanded to the District Court for further proceedings.

Foster v. Board of Trustees of  
Butler County Community  
College (1990/1991)

Facts. In March of 1987, Christopher Foster was an Ohio high school basketball player actively involved in the college recruitment process. Foster accepted an offer for a campus visit from Randy Smithson, head basketball coach at Butler County Community College (BCCC), in El Dorado, Kansas. On the evening of March 21, 1987, Foster arrived at the airport in Wichita, Kansas where he was met by BCCC basketball supporter George Johnson. Smithson had tasked Johnson to meet Foster at the airport

because Smithson had already picked up five other recruits who had arrived earlier in the day and taken them to the National Junior College Basketball Tournament in Hutchinson, Kansas. Smithson had instructed Johnson to meet Foster, take him to dinner, and then take him to his hotel in El Dorado where Smithson would meet the recruit upon his return from the tournament. Johnson deviated from these instructions by taking Foster to the basketball tournament in Hutchinson instead of directly to the hotel. After failing to locate Smithson in Hutchinson, Johnson reached Smithson by telephone at Smithson's home at approximately 11:30 p.m. Smithson instructed Johnson to bring Foster to his home in El Dorado and provided Johnson with two separate sets of directions from Hutchinson to El Dorado. En route to El Dorado, Johnson failed to stop at a stop sign and collided with a truck driven by Gregory Clark shortly after midnight on March 22, 1987. Johnson was killed in the accident, Foster suffered severe injuries and slipped into a coma, and Clark sustained a serious back injury.

Foster and Clark both sued BCCC and Coach Smithson claiming they were vicariously liable for Johnson's negligence as well as liable for their own negligence in appointing Johnson as their representative. Foster additionally claimed that the defendants were liable for their failure to provide for his safety while he was under their care on a recruiting visit. The plaintiffs' suits were consolidated when each plaintiff filed a motion for partial summary judgment seeking "a ruling that the defendants are liable as a

matter of law under the doctrine of respondeat superior for George Johnson's negligence" (Foster, 1990, \*1). Foster also filed a motion to strike the defendants' allegations of his comparative fault. The defendants argued that Foster was negligent by riding as a passenger in a vehicle which they alleged had inoperative headlights.

The United States District Court for the District of Kansas denied each of the plaintiffs' motions. The court stated that two issues were raised by the plaintiffs' motions for partial summary judgment: "(a) whether Johnson was the agent or servant of the defendants; and (b) if so, whether he was acting within the scope of his authority" (Foster, 1990, \*15). While the court acknowledged that it was "highly unlikely" (Foster, 1990, \*23) that the defendants would prevail on their claims that Johnson was neither an agent of BCCC nor acting within his authority, they had been successful in raising questions that needed to be answered by a jury. Therefore, summary judgment was determined to be inappropriate. Likewise, with Foster's motion to strike the defendants' allegation that he had been negligent, the court found sufficient questions of fact to be presented to a jury.

In 1991, the trial court entered a directed verdict "that Johnson was the servant or employee of the BCCC defendants and was acting within the scope of his authority at the time of the accident" (Foster, 1991, p. 1125). Based on the theory of respondeat superior, the jury found the defendants to be 90% at fault for the accident and Clark to be 10% responsible. The

jury then awarded damages in the amount of \$2,257,000 to Foster and \$302,000 to Clark which were then reduced by Clark's 10% fault. The defendants filed a motion for a new trial claiming the verdict was excessive and alleging numerous errors in evidentiary rulings.

Arguments. The defendants made several arguments in support of a new trial. First, the defendants maintained that the verdict was contrary to the evidence introduced in the trial. The defendant's then argued that the trial court improperly entered a directed verdict as to Johnson's status and scope of employment. Next, the defendants maintained "that the jury's verdict was so excessive as to appear to have been based on prejudice or passion" (Foster, 1991, p. 1126). They also argued that the admittance of evidence regarding Johnson's lack of liability insurance was prejudicial, and the failure to allow Clark's opinion as to the dangerousness of the intersection where the accident occurred as inappropriate. Lastly, the defendants contended that the trial "court erred in refusing to allow the jury to consider the comparative negligence of plaintiff Foster" (Foster, 1991, p. 1132).

Decision/rationale. First, the United States District Court for the District of Kansas quickly dismissed the defendants' claim that the jury's verdict was contrary to the evidence. The court cited the fact that Johnson ran the stop sign as "sufficient to support a finding that Johnson was 100% at fault" (Foster, 1991, p. 1126). Therefore the jury's assignment of 90% fault to the defendants was consistent with the weight of the evidence.

The District Court then addressed the defendants' challenge to the trial court's directed verdict in detail. The defendants maintained that the extent of Johnson's relationship with BCCC and the scope of his duties were questions of fact to be answered by a jury. The District Court rejected this argument and concurred with the trial court's directed verdict. The court stated that "the controlling test in determining the existence of agency, so that the doctrine of respondeat superior would apply, is the right to control the purported employee" (Foster, 1991, p. 1130). The court noted, however, that an employer is relieved of liability for its agent's negligence if the agent was acting outside the scope of his or her authority when the tortious act was committed. With regard to the case at hand, the court found that Smithson clearly had the authority to seek Johnson's services and control his activities. The fact that Johnson received no compensation for his services was irrelevant to the determination that Johnson was acting as an employee of BCCC. The court also determined that Johnson was acting within the scope of his employment at the time of the accident. Even if Johnson had deviated from the scope of his employment by transporting Foster to the basketball tournament instead of the hotel as was directed by Smithson, "he re-entered the scope of his employment after he talked to Smithson" (Foster, 1991, p. 1131) and began his fateful return trip to El Dorado. Therefore, the court ruled that there was ample evidence to support the trial court's directed verdict. As Judge Theis wrote, "There was no



evidence from which a reasonable mind could conclude that Johnson either was not the employee of BCCC or was not acting within the scope of his authority at the time of the collision" (Foster, 1991, p. 1131).

As to the defendant's claim that the jury's verdict was excessive, the court noted that jury's are provided wide discretion in the determination of damages. After examining the record, the court found no evidence that the jury's award was a result of passion or prejudice. The damages awarded to Clark were "not so excessive as to shock the judicial conscience" (Foster, 1991, p. 1127) and were supported by evidence of permanent disability. Because the defendants settled with Foster subsequent to the filing of this motion, the court only addressed the appropriateness of Clark's award.

The court then ruled that the trial court correctly admitted evidence regarding Johnson's lack of liability insurance. Although Federal Rules of Evidence generally bar the admission of insurance information for the purpose of demonstrating negligent conduct on the part of a defendant, the use of such information is not completely prohibited. In this case, the insurance information was not introduced to demonstrate Johnson's negligence, but rather "to show that the BCCC defendants failed to use due care in selecting Johnson to perform the task of transporting Foster" (Foster, 1991, p. 1128). The court found this information to be "very probative of the complete lack of investigation or inquiry into Johnson's background prior to entrusting Johnson with Foster's safety" (Foster, 1991, p. 1128). The

court judged the probative value of this information to far outweigh the possible prejudicial consequences of its admittance.

The District Court also ruled that the trial court correctly prevented the defendants' counsel from questioning Clark as to his opinion of the dangerousness of the intersection where the accident occurred. The court determined that the probative value of this information "would be substantially outweighed by the danger of misleading the jury" (Foster, 1991, p. 1129). The defendants wanted to pursue this question to demonstrate Clark's knowledge of this hazardous intersection and to imply that he should have exercised more caution when approaching it.

Finally, the court addressed the question of Foster's comparative fault. The defendants argued that Foster was negligent in riding as a passenger in a vehicle with inoperative headlights. This allegation was based solely on Clark's testimony that he had seen no headlights prior to the collision. Although this allegation, if corroborated, could be sufficient to demonstrate negligence on the part of Foster, the court found no additional evidence to suggest that Johnson was driving with no headlights. The court noted that the jury did find Clark to be 10% at fault and his "testimony that he saw no lights is evidence that Clark may have been inattentive" (Foster, 1991, p. 1132).

In summary, the District Court upheld each of the judgments forwarded by the trial court and jury. The court refused to grant a reduction in the

damages awarded to Clark and denied the defendants' motion for a new trial.

Hartman v. University  
of Kentucky Athletic  
Association, Inc. (1991)

Facts. Scott Hartman was a student-athlete at the University of Kentucky when he was severely injured while practicing for an athletic competition at the university. Hartman filed suit against numerous defendants including the University of Kentucky Athletic Association (UKAA). Claiming it was an arm of the state, UKAA filed a motion to dismiss Hartman's suit against it based on sovereign immunity. The trial court determined "that UKAA was not an arm of the state and was therefore not entitled to immunity" (Hartman, 1991, \*2). Subsequently, UKAA filed an interlocutory appeal to the United States Court of Appeals for the Sixth Circuit. An interlocutory appeal is "an appeal of a matter which is not determinable of the controversy, but which is necessary for a suitable adjudication of the merits" (Black, 1991, p. 563).

Arguments. UKAA objected to the denial of its motion for dismissal which was treated by the court as a motion for summary judgment. UKAA argued that the "underlying factual findings" (Hartman, 1991, \*3) used by the judge in denying summary judgment were incorrect.

Decision/rationale. The Sixth Circuit Court addressed the issue of whether interlocutory appeal was appropriate in this case. The court stated

that interlocutory appeal may be appropriate to review a lower court's immunity determination, but is inappropriate when disputes of material fact exist. The court noted that UKAA's objection itself created a genuine dispute of material fact by contesting the trial court's underlying factual findings upon which its decision was based. The Circuit Court judged these factual findings to be "material because they are the basis for determining whether UKAA was a separate entity from the state, and therefore not entitled to Eleventh Amendment immunity" (Hartman, 1991, \*3).

The Circuit Court ruled that it lacked subject matter jurisdiction to hear UKAA's appeal because of the existing dispute over material facts of the case. Accordingly, the court dismissed UKAA's appeal of the trial court's denial of summary judgment. To rectify the alleged discrepancy in factual findings, the court stated that UKAA "should introduce evidence at trial to persuade the district judge that the facts are different from what the judge determined...at the time of the motion for summary judgment" (Hartman, 1991, \*4).

Westrum v. Hamline University  
of Minnesota (1991)

Facts. Penni Westrum injured her knee while dismounting from a balance beam during a gymnastics meet at Hamline University. There was no spotter present to assist Westrum during the routine in which she was injured. Westrum filed suit against Hamline University which moved for a directed verdict. The trial court granted Hamline University's motion for a

directed verdict concluding that Westrum assumed the risks associated with collegiate gymnastics when she agreed to compete in the meet. Westrum appealed the directed verdict.

Arguments. Westrum argued that the trial court erred in granting a directed verdict based on the university's assumption of risk defense. Hamline University relied on the trial court's ruling that Westrum, "as a matter of law, assumed the risk of a knee injury when she participated in a collegiate gymnastics competition" (Westrum , 1991, \*2).

Decision/rationale. The Court of Appeals of Minnesota found that Westrum not only assumed the "risks inherent in the sport of gymnastics" (Westrum , 1991, \*2), but also assumed the risks associated with the particular dismount she was attempting when injured. The court noted that Westrum was a highly experienced and skilled gymnast who admitted through testimony that she was aware of the inherent risks of the sport, to include the possibility of knee injuries. Furthermore, the court determined that Westrum was fully aware of the risks associated with her chosen dismount as well as the fact that there was no spotter to assist her. Westrum conceded that she could have refused to begin her routine until a spotter was present but chose not to do so. Therefore, the Court of Appeals affirmed the trial court's directed verdict preventing the plaintiff from recovering damages based on her assumption of risk.

Fox v. Board of Supervisors of  
Louisiana State University and  
Agricultural and Mechanical  
College (1990/1991)

Facts. Tim Fox was a member of the St. Olaf College rugby club which participated in the 1986 Louisiana State Rugby Club Annual Mardi Gras Invitational Rugby tournament held at Louisiana State University (LSU). The St. Olaf club traveled from Minnesota to New Orleans, where they enjoyed a day of Mardi Gras festivities, and then on to Baton Rouge. They arrived in Baton Rouge about 11:00 p.m. on the evening prior to the tournament and attended a party hosted by the LSU rugby club until approximately 2:00 a.m. At 8:00 a.m. that morning St. Olaf played its first match with another match at 3:00 that afternoon. Toward the end of the afternoon match, Fox struck his head on the ground while attempting to tackle an opponent and broke his neck. As a result of the accident, Fox was rendered a quadriplegic.

Fox and his parents filed suit against St. Olaf College, St. Olaf's insurers, the Board of Supervisors of LSU, and LSU's insurance carrier for damages. The trial court dismissed the charges against St. Olaf College and its insurers based on a lack of jurisdiction and entered summary judgment in favor of LSU and its insurance carrier. The plaintiffs appealed to the First Circuit Court of Appeal of Louisiana which affirmed the trial court's ruling. The Supreme Court of Louisiana granted the plaintiffs' writs and reviewed the lower courts' decisions.

Arguments. The Fox family argued that two theories supported Fox's contention that LSU was liable for his injury. First, the plaintiffs maintained that LSU was vicariously liable for its rugby club's negligent conduct when it (a) hosted a cocktail party the evening prior to the tournament; (b) scheduled St. Olaf for two matches on the same day; and (c) failed to inquire as to the quality of the visiting teams' coaching, training, and supervision. Second, the plaintiffs argued that LSU was "liable in its own right for failing to ensure that the tournament was conducted with adequate safety" (Fox, 1991, p. 980). Fox maintained that his injury was due, in large part, to fatigue. He argued that this tragic accident would have been averted had LSU (a) prevented the prior evening's party, (b) scheduled only one match per day for each team, and (c) ensured that each team had quality coaching which would have reduced player fatigue through more liberal substitution.

Additionally, the Fox family argued that the dismissal of the case against St. Olaf College was inappropriate. They asserted that St. Olaf had "sufficient contacts with Louisiana to require it to defend" (Fox, 1990, p. 854) itself against their claim in Louisiana courts.

Decision/rationale. The Supreme Court of Louisiana stated that the issue in this case was, quite simply, "whether LSU owed a legal duty to [the] plaintiff to protect him from harm" (Fox, 1991, p. 981). Because this was a case in which the defendant's alleged negligence was a failure to act, or

nonfeasance, the court ruled that the plaintiffs were required to demonstrate a "definite relationship between the parties" (Fox, 1991, p. 981) before a duty could be imposed. The court found that the only relationship between Fox and LSU was that Fox was injured on the university's parade grounds. The plaintiffs failed to show any other relationship between Fox and LSU at the time of the accident. Because no definite relationship between Fox and LSU was established, the university had no duty to be proactive in protecting Fox from injury. As Justice Hall wrote: "The fact that a club at LSU invited [the] plaintiff's team to LSU does not make LSU the guardian of all the participants' safety" (Fox, 1991, p. 982).

The court also rejected the plaintiff's claims that LSU was vicariously responsible for the alleged negligent conduct of its rugby club. The court noted that clubs at LSU are operated autonomously by students, and that this autonomous operation serves a distinct educational purpose. Although the university approves the charters of clubs and provides limited personnel, capital, and financial support, the court did not find these circumstances sufficient to make the rugby club "an arm of the university" (Fox, 1991, p. 983). Because of this independent relationship between the rugby club and the university, the court held that LSU could not be held responsible for the negligent conduct of its rugby club and affirmed the trial court's summary judgment in favor of LSU and its insurer.



The court also upheld the dismissal of St. Olaf as a defendant based on the lack of jurisdiction. The court stated that St. Olaf does not recruit heavily in Louisiana nor conduct other major activities in the state and, therefore, could not reasonably "anticipate being haled into court in Louisiana for unrelated causes of action" (Fox, 1991, p.985). The court did, however, rule that Louisiana had jurisdiction over St. Olaf's insurance carriers. This was because these companies did business in Louisiana and because it was beyond the authority of the trial court to dismiss the defendants based on the inconvenience of a trial in Louisiana. Accordingly, the Supreme Court of Louisiana reversed the trial court's dismissal of St. Olaf's insurers as defendants and remanded that portion of the case to the trial court for further proceedings.

There was a dissenting opinion in this case. Justice Watson strongly disagreed with the majority opinion's characterization of the relationships between the two institutions and their rugby clubs. Watson felt there was a much greater supervisory duty imposed on institutions which sponsor teams and then send them "on the road to play in other states" (Fox, 1991, p. 991). Watson's analysis characterized an institution's relationship with its clubs as one which more closely resembles that of its relationships with its varsity sports.

Riddle v. Universal  
Sport Camp (1990)

Facts. Theresa Riddle was a cheerleader for Kansas State University from the Fall of 1983 through the Spring of 1985. As a member of the cheerleading squad, Riddle was required to attend the Universal Sport Camp in August of 1984. Before attending camp, Riddle signed a release which contained an exculpatory clause releasing Universal Sport Camp from liability for injuries. While attending camp, Riddle was participating in the building of a "pyramid" in which she was to be the cheerleader at the top of the formation. The two men who were to toss Riddle to the top of the pyramid did so with too much force, causing her to miss her target and fall approximately 15 feet. There were no spotters present at the front of the pyramid to assist and protect the cheerleaders while attempting the stunt.

As a result of the fall, Riddle suffered back pain and spasms but was told by camp employees that she had simply hyperextended her back. The camp employees did not recommend that Riddle seek medical attention and she participated in cheerleading activities the next day. Three days later, however, Riddle's back was X-rayed and a fractured vertebrae was discovered. Riddle was treated with medication and therapy and subsequently returned to cheerleading at Kansas State University.

Riddle filed a personal injury suit against Universal Sports Camp, supervisors at the camp, Kansas State University, the Kansas Board of Regents and the State of Kansas. The trial court entered summary judgment in favor

of all the defendants by applying Tennessee law and determining that "Riddle had expressly assumed the risk of her injury" (Riddle, 1990, \*1).

Riddle appealed the summary judgment.

Arguments. Riddle argued that the defendants were negligent in not ensuring a spotter was present while the cheerleaders formed the pyramid. Riddle urged the court to apply a public policy exception to the enforcement of the exculpatory clause contained in the release which she signed. Riddle maintained that she did not read the exculpatory clause and had no intention of releasing Universal Sport Camp from liability. Riddle did not contest the application of Tennessee law by a Kansas court because Tennessee was the state in which the injury occurred.

Universal Sport Camp maintained that the exculpatory clause was fully enforceable under Tennessee law and released it from any liability for Riddle's injury. Likewise, the remaining defendants argued that Riddle had assumed the risks associated with cheerleading as well as having contributed to the accident through her own negligence.

Decision/rationale. The Court of Appeals of Kansas affirmed the trial court's entry of summary judgment in favor of Universal Sport Camp. The court noted that "Tennessee courts have narrowly defined the exceptions to valid exculpatory clauses and have enforced such clauses in cases involving sports injuries" (Riddle, 1990, \*6). Riddle signed the release freely and in her own capacity, and the fact that she did not read the exculpatory

agreement thoroughly did not alter the validity of the release. The court noted that Tennessee public policy clearly favors "freedom to contract against liability for negligence" (Riddle, \*6).

The Court of Appeals for Kansas also affirmed the trial court's entry of summary judgment in favor of the remaining defendants, but modified the judicial rationale. The trial court ruled that Riddle's expressed assumption of risk, which was evident by her signature on the release, barred her liability claims against all named defendants. The appellate court determined that the release barred claims against Universal Sport Camp only. This was because no other defendants required the release nor were named in the agreement and therefore could not cite it as a contractual release of liability. Therefore, the court ruled that the remaining defendants could not base their defense on express assumption of risk, but could very well demonstrate an implied assumption of risk on the part of Riddle.

The court highlighted the necessary elements of an assumption of risk defense as: (a) the plaintiff's actual knowledge of the risk of danger, (b) the plaintiff's appreciation of the extent of that danger, and (c) the plaintiff's voluntary exposure to the known danger. The court determined that Riddle possessed knowledge of the risks inherent in cheerleading. She was an experienced cheerleader, had previously attended camp, and had formerly sustained a cheerleading injury which required surgery. The court also determined that Riddle's experience would necessarily allow her to

appreciate the obvious danger involved in forming the pyramid. The court then found that the release signed by Riddle satisfied the third element required to demonstrate Riddle's assumption of risk. Although the release could not serve as a contractual bar from claims against the remaining defendants, it could, however, serve as "written evidence of Riddle's voluntary exposure to the known dangers involved in participating in the cheerleading camp" (Riddle, 1990, \*8). Therefore, all elements were present to establish the fact that Riddle assumed the risks associated with Cheerleading.

Although Riddle's assumption of risk was clearly demonstrated, she maintained that she did not assume the risks associated with the defendants' negligence in not ensuring a spotter was present. Although the implied assumption of risk doctrine is normally applied to only those risks inherent in a particular activity, there is an exception. Secondary implied assumption of risk involves an "encounter with a known and obvious risk created by the negligent conduct of another" (Riddle, 1990, \*10). The court determined that, notwithstanding the defendants' negligence, Riddle knowingly and voluntarily exposed herself to the unreasonable risk of falling 15 feet without spotters. Therefore, the defendants' negligence does not prevent them from raising Riddle's assumption of risk as a defense to her claims against them.

Accordingly, the court affirmed the trial court's entry of summary judgment in favor of all named defendants. Summary judgment for Universal Sport Camp was based on Riddle's express assumption of risk, while summary judgment for the remaining defendants was based on Riddle's implied assumption of risk.

Healy v. Vaupel (1990)

Facts. On October 23, 1985, Tara Healy sustained a knee injury while participating on the women's gymnastics team at Northern Illinois University. Healy filed suit against the university's two athletic directors, the gymnastics coach, and the team's athletic trainer alleging that her injury was caused by the "defendants' negligent performance of their respective job duties" (Healy, 1990, p. 1242). Among other allegations, Healy claimed that the athletic directors negligently hired athletic department employees and failed to supervise and train them once they were employed. She maintained that the athletic directors also breached their duty to warn her of the inherent risks associated with collegiate gymnastics. Healy alleged that the coach failed to properly train and supervise the members of his team as well as his assistant coaches. Lastly, Healy accused the athletic trainer of failing to properly supervise Healy's rehabilitation program after the injury.

Healy's suit for damages was first brought forward in the Circuit Court of De Kalb County. The defendants filed a motion to dismiss the suit claiming that the circuit court lacked jurisdiction on this matter as the Illinois

Court of Claims possessed exclusive jurisdiction of suits against the state. The circuit judge denied the defendants' motion for dismissal, but allowed them to appeal the question of jurisdiction to the Illinois Appellate Court. The Appellate Court then denied the defendant's petition for leave to appeal the question to the Supreme Court of Illinois. The Supreme Court overruled the Appellate Court's denial of the petition and heard the defendant's appeal.

Arguments. Healy first argued that the Supreme Court of Illinois erred when it granted the defendants' request to review this case. Healy based this argument on three alleged procedural errors. First, Healy argued the Supreme Court of Illinois lacked jurisdiction over this appeal. She maintained that supreme court review would, in essence, allow "an unauthorized direct review of the Circuit Court's order refusing to dismiss the present action" (Healy, 1990, p. 1243). Second, Healy maintained that the decision to allow the defendants to appeal was made through improper interpretation of Illinois Supreme Court rules. Lastly, Healy argued that the sole question before the Supreme Court of Illinois was whether the Appellate Court abused its discretion in denying the defendants' appeal and not whether the Circuit Court erred in its decision regarding jurisdiction.

Healy also presented arguments regarding the question of jurisdiction of her claims. Citing previous appellate court decisions and Illinois statutes, Healy argued that claims such as hers which are filed against "individual

agents and employees of the state" (Healy, 1990, p. 1249) are not required to be heard in the Court of Claims but instead could be heard in a circuit court.

The defendants argued that the Circuit Court clearly "lacked subject matter jurisdiction over the action and that the Court of Claims provided the only forum for the matter" (Healy, 1990, p. 1242). The defendants cited the Illinois Court of Claims Act which empowered the Court of Claims with exclusive jurisdiction over claims against the state.

Decision/rationale. The Supreme Court of Illinois first addressed Healy's procedural arguments. The court stated that there is no provision in Illinois which requires the Appellate Court to render a decision on the merits of a case before that case can be reviewed by the Supreme Court. Therefore, the court's agreement to hear the defendants' appeal did not constitute an unauthorized review of the circuit court's decision. The court next ruled that, contrary to Healy's contention, it had properly interpreted and applied the applicable Supreme Court Rules in this case. The court noted that the relationship between the Appellate Court and the Supreme Court was not the same as the relationship between the Circuit Court and the Appellate Court. Therefore, the Supreme Court had the authority to review appeal denials by the Appellate Court and, in fact, did so quite often. Finally, the Supreme Court also rejected Healy's argument that it could only review the Appellate Court's possible abuse of discretion. The court stated that it



possessed a broad scope of review authority and this "authority to consider the merits of the underlying issues cannot be doubted" (Healy, 1990. p. 1245).

With regard to the jurisdiction question first forwarded by the Circuit Court, the Supreme Court was required to determine if this case constituted a claim against the state. The court stated that this question "depends not on the formal identification of the parties but rather on the issues involved and the relief sought" (Healy, 1990, p. 1247). State employees are immune from suit in Illinois Circuit Court as long as they have not violated any law or acted beyond the scope of their authority. In the case at hand, Healy claimed that the defendants negligently performed their duties as employees of a state university. Because Healy made no claims of illegal conduct or activity beyond the scope of their employment, the court found that her suit could only be heard in the Illinois Court of Claims. Accordingly, the Supreme Court remanded the case to the Circuit Court of De Kalb County for dismissal. The Supreme Court instructed the Circuit Court to decide whether the case would be dismissed with or without prejudice.

#### Negligence--Facilities/Equipment

Bialek v. Moraine Valley  
Community College School  
District 524 (1994)

Facts. On October 13, 1985, Bruce Bialek and several of his friends were playing a pick-up game of football on Moraine Valley Community

College's Ridgeland Campus in Alsip, Illinois. There was a steel goalpost located on the field on which Bialek and his friends were playing, but they used the goalpost strictly as a boundary marker. While running a pass pattern during the game, Bialek, who was 25 years old at the time, crashed face-first into the goalpost. Bialek suffered a broken nose as well as severe lacerations to his genital area and abdomen from a metal bracket which protruded from the goalpost's upright. Bialek was treated for his injuries at a nearby hospital where he was retained for three days. Bialek did not return to work until three weeks after the accident. Neither Bialek nor his friends were authorized to use the college facility on which Bialek was injured.

Bialek filed suit against Moraine Valley Community College School District 524 alleging negligence as well as willful and wanton misconduct in the college's campus maintenance. The negligence claim was subsequently dropped pursuant to Illinois statutes which protect local government agents from liability for negligence relating to their recreational facilities. The charge that the college displayed willful and wanton misconduct was based on the college's failure to (a) remove the goalpost from the field, (b) warn Bialek of the goalpost's presence, and (c) pad the bracket and goalpost.

At trial, Moraine Valley Community College moved for a directed verdict in its favor. College employees testified that the field in question was seldom used for athletic events and the goalpost was not considered a

hazard. The college also "testified that there were signs posted on the campus informing would-be users of the fields to obtain the college's permission prior to use" (Bialek, 1994, p. 827). The college then maintained that it owed no duty to protect Bialek from an open and obvious condition such as a goalpost on the field, or to remedy such a condition. Lastly, the college argued that even if it had owed Bialek such a duty, there was no evidence of willful and wanton misconduct in the maintenance of the goalpost "because the school had not received any prior complaints about injuries suffered on the structure" (Bialek, p. 827). Black (1991) defined willful and wanton misconduct as "conduct which is committed with an intentional or reckless disregard for the safety of others or with an intentional disregard of a duty necessary to the safety of another's property" (p. 1103). The trial judge denied the college's motion for a directed verdict and the jury ruled in favor of Bialek but found him 45% responsible for his injuries. Bialek was awarded \$73, 069.12 in damages and the community college appealed the judgment.

Arguments. Moraine Valley Community College argued that the trial court erred in denying its motion for a directed verdict. The college maintained that it had no duty to Bialek "to remedy a condition on its property which was open and obvious, and the dangers of which could easily be appreciated and avoided by a child let alone a group of adults" (Bialek, 1994, p. 828).

Bialek countered by arguing that the doctrine of distraction imposed a legal duty on the college to protect him from the hazards associated with the goalpost. The doctrine of distraction, as stated by the Illinois Supreme Court in Ward v. K-Mart Corporation (1990), "rejected the longstanding ruled that when a dangerous condition is open and obvious, a landowner need never warn or otherwise protect those who might encounter the condition" (Bialek, 1994, p. 828). Instead, the Ward opinion established a duty for property owners to remedy or warn of open and obvious conditions on their property if it is reasonably foreseeable that individuals on the premises may become distracted or forgetful of the condition even after having already been made aware of its existence.

Decision/rationale. The First District Appellate Court of Illinois first addressed Bialek's contention that the doctrine of distraction was applicable in this case. The court noted that the Ward opinion applied to a negligence claim and that Bialek, as a trespasser on Moraine Valley's campus, was not entitled to protection from negligence but from willful and wanton misconduct only. The court was unable to cite any other case in which the doctrine of distraction, as applied in Ward, was applied to a situation in which the defendant's liability was limited to willful and wanton conduct. After thorough analysis, the court concluded that "the theoretical application of the distraction doctrine in a case is unrelated to whether the plaintiff has predicated his complaint upon negligence or willful and wanton conduct"

(Bialek, 1994, p. 829). This is based on the court's determination that a landowner who chooses to ignore a danger which may injure a reasonably distracted individual may be acting with reckless disregard for the safety of others. Therefore, the court ruled that the doctrine of distraction could be applicable to cases alleging willful and wanton misconduct.

Having ruled that the doctrine of distraction may be applicable to claims of willful and wanton misconduct, the court rejected Bialek's application of the doctrine in this case. The court interpreted the doctrine of distraction to be applicable to distractions beyond one's control, not distractions of one's own making. Citing precedent, the court stated that the doctrine of distraction "did not apply in situations where a plaintiff's voluntary recreational activities caused him to blind himself to dangers that surround him" (Bialek, 1994, p. 830). Additionally, the court noted that a plaintiff is required to demonstrate that he or she was exercising a reasonable degree of care at the time of the accident in order to apply the doctrine of distraction. In this case, Bialek and his friends intentionally used that part of the field where the goalpost was located and actually incorporated the goalpost into the game as a boundary marker. The court found this to be a failure on the part of Bialek to exercise reasonable care and stated that the doctrine of distraction cannot be invoked "simply because the plaintiff begins mindlessly using an open and obvious dangerous condition" (Bialek, p. 830). Therefore, the

college had no duty to protect or warn Bialek under the doctrine of distraction.

The court then stated that even if the college had owed Bialek a duty to warn or otherwise protect him from the goalpost, there was absolutely no evidence to suggest that the college's conduct was in any way willful and wanton. The court determined that the college "was guilty of an omission to act which, given the evidence, constituted, at worst, negligent conduct for which it is not liable" (Bialek, 1994, p. 831). Accordingly, the court reversed the trial court's judgment which found that Moraine Valley Community College engaged in willful and wanton misconduct and ruled that the college was entitled to a directed verdict.

In a lengthy dissent, Justice Buckley agreed with the majority's opinion that the college was entitled to a directed verdict, but disagreed with the majority as to the duty the college owed Bialek. Buckley agreed that the doctrine of distraction imposes a duty on a landowner if an open and obvious condition exists and it is reasonably foreseeable that an individual may become distracted so as to forget about the existence of the condition. Where Buckley disagreed was the majority's "intermediary inquiry which asks whether [the] plaintiff created the distraction himself, was engaged in voluntary recreational activities or was required to encounter the risks" (Bialek, 1994, p. 834). Buckley maintained that when a plaintiff is distracted through his or her own recreational activities, even while voluntarily

encountering a specific risk, the defendant may still owe the plaintiff "a duty if such a distraction is reasonably foreseeable" (Bialek, p. 834).

Giovinazzo v. Mohawk Valley  
Community College (1994)

Facts. Connie Giovinazzo was a member of the Mohawk Valley Community College women's softball team on April 7, 1990, when she was injured while playing on an Oneida County, New York softball field. Giovinazzo was injured when her left foot "became stuck in a wet, spongy area in shallow left field" (Giovinazzo, 1994, p. 91) as she attempted to field a fly ball.

Giovinazzo filed a negligence suit against Mohawk Valley Community College and the County of Oneida. The defendants filed a motion for summary judgment which was granted by the Supreme Court, Oneida County. Giovinazzo appealed the entry of summary judgment.

Arguments. Giovinazzo argued that the defendants negligently maintained the softball field and failed to provide proper supervision to the users of the field. The defendants countered that Giovinazzo assumed the risk of injury by voluntarily participating in the softball game. They argued that Giovinazzo was well aware of the risks inherent in playing softball on a wet field, yet chose to participate nonetheless.

Decision/rationale. The Supreme Court, Appellate Division, determined that Giovinazzo was "fully aware of the condition of the field and the inherent risk of injury" (Giovinazzo, 1994, p. 91) when she agreed to participate

in the softball game. The court ruled that the defendants were not required to demonstrate that Giovinazzo "foresaw the exact manner in which her injury occurred" (Giovinazzo, p. 91). Rather, the defendants needed only to prove that Giovinazzo appreciated the inherent risks of playing softball on a wet field. Giovinazzo was unable to refute the defendants' contention that she was aware of such risks and therefore unable to persuade the court to reverse the trial court's summary judgment. Accordingly, the court affirmed the lower court's entry of summary judgment in favor of the defendants.

Rispono v. Louisiana State  
University and Agricultural  
and Mechanical College (1994)

Facts. On May 28, 1990, Joseph Rispono was a spectator at a Louisiana State University (LSU) baseball game at the university's Alex Box Stadium. Rispono and his companions were seated in temporary bleachers on the left field line when they decided to relocate to different seats. As Rispono proceeded down the bleachers he stepped on an irregular step and fell. As a result of his fall, Rispono broke two ribs and ruptured his right achilles tendon.

Rispono filed suit against LSU and its Board of Supervisors for negligently failing to remedy a hazard on their facility or provide a warning to patrons of the hazard's existence. The trial court found LSU to be 90% responsible for the accident while finding Rispono 10% at fault for his minor inattentiveness. Rispono was awarded \$80,000 in general damages and



\$24,260.78 in lost wages. LSU appealed the judgment, claiming the findings of liability, causation, fault allocation, and damages were inappropriate. Risponne also appealed, challenging the court's 10% fault allocation to him and the amount of the general damages.

Arguments. LSU argued that the trial court's finding which held the university liable for Risponne's injuries because the non-uniform step rendered "the bleachers unreasonably dangerous" (Risponne, 1994, p. 732) was in error. The university cited the fact that the bleachers had been in use for three years with no reported incidents prior to Risponne's. Additionally, even if the irregular step posed some threat to safety, LSU maintained that the step's existence was so obvious to all patrons as to relieve the university of any duty to warn.

Next, LSU argued that the trial court erred in assigning causation of the accident to the existence of the irregular step. LSU contended that Risponne's inattentiveness was the sole cause of his fall and, therefore, the assignment of 90% fault to LSU was excessive.

Risponne forwarded quite a different argument. He maintained that the trial court should have found LSU's negligence as the sole cause of the accident and the assignment of 10% fault to him was in error. Both parties also challenged the damage awards as inappropriate.

Decision/rationale. The First Circuit Court of Appeal of Louisiana agreed with the trial court's judgment that LSU negligently failed to remedy the

hazard created by the non-uniform step or, at the very least, warn its patrons of the step's existence. The court noted that the normal distance between bleacher steps was 12 inches, but only one inch existed between the steps where Risponse fell. This dramatic irregularity posed a real hazard, of which LSU was clearly aware but failed to address. These facts established the fact that LSU had a duty to provide its spectators with a safe environment and breached that duty by maintaining hazardous bleachers.

The court also refused to alter the trial court's assignments of causation and fault. The court stated that a trial court's findings on these issues "are entitled to great weight and may not be disturbed in the absence of manifest error" (Risponse, 1994, p. 732). The court failed to find error in the trial court's determinations and found them to be quite reasonable.

Lastly, the appellate court found the trial court's damage awards to be strongly supported by the evidence of Risponse's injuries. The court stated that the award of general damages was supported by the fact that Risponse's employment and recreational activities were permanently restricted as a result of his injuries. After months of physical therapy and surgery, Risponse's physician stated that the plaintiff had reached "his maximum medical improvement" (Risponse, 1994, p. 733). Nonetheless, Risponse experiences a 12% disability to his lower extremities and a 5% disability overall. He will continue to experience tendinitis and inflammation in his achilles tendon as well as atrophy of his right leg. Risponse is unable to

resume his full duties as an industrial electrician field superintendent which requires extensive climbing and standing to perform inspections. These factors, together with the fact that "an appellate court should rarely disturb an award of general damages" (Rispone, p. 733), convinced the court that the general damages awarded to Rispon

e by the trial court were appropriate.

Likewise, the court found that the evidence supported the trial court's award of damages for lost wages. The court affirmed the entire judgment entered by the trial court and assessed the costs of the appeal to LSU.

Clement v. Griffin (1994)

Facts. On April 25, 1986, a Ford van owned by Delgado Community College and driven by Brent Griffin was traveling north on Interstate 59 when a blowout of its right rear tire caused Griffin to lose control. The van rolled at least three times, ejecting several of the 13 passengers who were all members of the college's baseball team en route to a game in Meridian, MS. The players sustained a wide array of injuries, many of them serious, and numerous lawsuits followed.

The cases were consolidated into suits against: (a) Delgado Community College and the State of Louisiana; (b) the manufacturer of the tire, the Goodyear Tire and Rubber Company; and (c) the Ford Motor Company. The private defendants' case was tried to a jury while the public defendants' case was tried to a judge. The liability and damages portions of both cases

were tried separately. The jury exonerated Ford from any liability, but found Goodyear to be 60% liable and Delgado 40% liable. The trial judge then adopted the jury's findings on Delgado's liability. A new jury was assembled to hear the damages portion of the trial and returned damage awards ranging from 25 thousand dollars to over two million dollars for nine of the plaintiffs. Appeals were filed by Goodyear and Delgado as well as one of the plaintiffs. Delgado appealed the trial court's adoption of the jury's liability findings. Delgado and Goodyear both appealed the trial court's decision to dismiss the original jury and try the damages portion of the case with a new jury. Plaintiff Davey Clement joined Delgado in appealing the finding that Ford was not at all liable for the accident. Lastly, both Delgado and Goodyear challenged the liability findings against them.

Arguments. Delgado first argued that the trial judge violated a Louisiana statute which forbids suits against the state to be tried to a jury. In adopting the jury's assignment of liability, Delgado argued that the judge, in essence, allowed the jury to determine its liability. Delgado and Goodyear also argued that the trial judge committed a reversible error when he dismissed the original jury and assembled a new jury to determine damages. Louisiana code clearly states that the "same jury" (Clement, 1994, p. 421) which found a defendant liable will "proceed with the trial on the remaining issues" (Clement, p. 421).

Delgado and plaintiff Clement challenged the jury's exoneration of Ford arguing that defects in the van caused the accident and subsequent injuries to the occupants of the van. Delgado maintained that defects in the van's handling characteristics rendered the van impossible to control in the event of a rear tire blowout. Clement argued that a defective "rear door latch was unreasonably dangerous" (Clement, 1994, p. 440) and exacerbated his injuries by allowing him to be thrown from the rear of the van when the door opened during the accident.

Goodyear argued that the plaintiffs were unsuccessful in their attempt to prove Goodyear liable for the accident and the trial court's finding of Goodyear's liability was in error. Goodyear maintained that the plaintiffs' product liability claim against it was based solely on the plaintiffs' contention that "the tire was unreasonably dangerous in construction or composition" (Clement, 1994, p. 423). Goodyear argued that the above contention was improperly validated in the trial through an unqualified expert witness, inappropriate arguments to the jury, improper instructions to the jury, and the court's failure to enter a directed verdict in Goodyear's favor. Therefore, Goodyear argued that its liability was found through multiple reversible errors by the trial court and the verdict should be reversed.

Delgado argued that the plaintiffs' negligence claim against it should be reversed because the plaintiffs failed to demonstrate two elements essential to any negligence claim. First, the college argued that the plaintiffs failed to

prove that Delgado breached any duty owed to the plaintiffs. Next, Delgado maintained that the plaintiffs were unsuccessful in their attempts to establish a causal connection between Delgado's alleged breach of duty and the accident. Additionally, Delgado argued that the trial court erred in refusing to apply the sudden emergency doctrine to this case which would have relieved the driver, and thus Delgado, "of any negligent operation of the vehicle after the blowout" (Clement, 1994, p. 437).

Decision/rationale. The Fourth Circuit Court of Appeal of Louisiana rejected Delgado's argument that the trial judge erred in adopting the jury's assignment of liability. The court noted that "nothing in the law or the jurisprudence inhibits a judge from adopting a jury's decision in a bifurcated [split] trial, so long as he has independently considered the law and evidence first" (Clement, 1994, p. 423). The court found no evidence to suggest "that the trial judge abdicated his responsibility to decide the case" (Clement, p. 423), but rather interpreted the judge's ruling as one which was consistent with the jury's. The court ruled that, absent an unreasonable holding by the trial judge, the fact that the jury's verdict was adopted by the trial judge in a bifurcated trial is not grounds to reverse.

The court also rejected the defendants' appeal of the trial court's dismissal of the original jury. Although acknowledging that the dismissal was clearly erroneous, the court noted that the defendants had filed writs with the Louisiana Supreme Court at the time of the trial court's decision,

seeking a mistrial. The Louisiana Supreme Court ordered that, in the interest of "judicial economy" (Clement, 1994, p. 421), the trial court proceed with the damages portion of the trial using a new jury. The appellate court found the Supreme Court's ruling to be binding and refused to reconsider this issue.

The court reviewed the evidence concerning Ford's alleged liability. Although there was conflicting evidence regarding the handling characteristics of the van and the issue of whether or not occupants were ejected out the rear door, the court found no manifest error in the trial court's holding. The court stated that when there is conflicting evidence, the trial court's "decision to accept one version over another cannot be manifestly erroneous" (Clement, 1994, p. 441) and must, therefore, be affirmed. Accordingly, Ford was completely exonerated of any liability for the accident.

Goodyear was found 60% liable for the accident by the trial court based solely on the testimony of an expert witness who, through a discovery made by another individual, concluded that the blowout was a result of a microscopic defect in the construction of the tire. Although the court rejected Goodyear's arguments that the expert witness did not qualify as a "tire failure analyst" (Clement, 1994, p. 425), it did agree with Goodyear that the testimony of the expert witness "concerning the manufacturing defect in the tire" (Clement, p. 427) was inadmissible. The court found that the scientific procedures and methodology of the expert witness did not

meet the required "'threshold level of reliability in order to be admissible'" (Clement, p. 427). Based on the above determination of inadmissibility, coupled with improper arguments by the plaintiffs and improper instructions to the jury, the court reversed the decision against Goodyear. The court stated that the only evidence upon which the jury based its finding of liability against Goodyear was the testimony of the expert witness. The verdict was therefore erroneous and improper.

Because the court reversed the trial court's decision against Goodyear based on an erroneous jury verdict, it was required to "review the evidence presented at the trial *de novo* [anew] to determine whether the plaintiffs carried their burden of proving that the tire manufactured by Goodyear was defective" (Clement, 1994, p. 432). Upon review, the court found insufficient evidence that the blowout was caused by a manufacturing defect and, therefore, entered its own judgment in favor of Goodyear.

In addressing Delgado's liability, the court first determined that there were four duties which the college owed the plaintiffs: (a) a duty to properly maintain the van; (b) a duty to appoint a qualified driver to operate the van; (c) a duty to adequately train the driver; and (d) "a vicarious duty, performed through the driver, to properly operate the vehicle" (Clement, 1994, p. 433). After examining Delgado's adherence to the above duties, the appellate court affirmed the trial court's ruling that Delgado not only



breached each duty but that each breach had a causal connection to the accident.

The court determined that Delgado's failure to properly maintain the tires of the van was one cause of the accident. After reviewing the testimony of numerous expert witnesses, the court found no manifest error in the trial court's ruling that Delgado "breached its duty to properly maintain the vehicle" (Clement, 1994, p. 435). The evidence suggested that the tire which failed was routinely inflated to 45 p.s.i. instead of 75 p.s.i. as recommended in the owner's manual. Testimony was consistent that continued operation of an underinflated tire, in and of itself, can cause a blowout. Therefore, the court affirmed the trial court's finding that Delgado was negligent in its failure to ensure proper inflation of the van's tires.

The court also found Delgado to have been negligent in its selection of Griffin as the driver of the van. The court noted that the college violated the law and its own rules which require that a passenger van be driven by an operator with a Class C chauffeur's driver's license only. The college also had internal rules forbidding the operation of the vans by students. Griffin, a student-coach, possessed only a basic Class A operator's driver's license at the time of the accident. The court ruled that Delgado negligently appointed an unqualified driver to operate the van and that driver's improper response to the blowout was a cause of the accident.

Delgado's failure to train Griffin on the appropriate "actions to take in the event of a blowout" (Clement, 1994, p. 436) was also found to be a breach its duty. The court found this to be particularly disturbing in light of the fact that a blowout had occurred the prior year on another of Delgado's Ford vans carrying the baseball team. The head coach who assigned Griffin to drive the van testified that he was aware of the previous year's blowout, but apparently never instructed Griffin on how to react if another occurred. The court found that because Delgado negligently failed to instruct Griffin, he reacted improperly to the blowout which exacerbated the accident and caused many of the injuries.

Lastly, the court held Delgado vicariously liable for Griffin's improper actions after the blowout. Testimony revealed that Griffin not only reacted negligently to the blowout, but was aware of the tire's dangerously low inflation level earlier in the day of the accident. Griffin's failure to act on that knowledge as well as his improper response to the blowout were found to be causes of the accident. Because Griffin was acting in his duties as a representative of the college, Delgado was found to be vicariously liable for his actions. The court failed to address Delgado's argument that the sudden emergency doctrine should be applied to relieve Griffin, and thus the college, of liability. The court stated that even if the sudden emergency doctrine relieved the college of vicarious liability, it would still be liable for "its own negligence in failing to properly maintain the tire, in selecting Griffin as

the driver of the van, and in failing to properly train Griffin to drive the van" (Clement, 1994, p. 439).

The final portion of this opinion was a detailed review of the damages awarded to the individual plaintiffs. Of the nine plaintiffs whose damages Delgado appealed, the appellate court reduced the damages awarded to three plaintiffs, increased the damages awarded to two plaintiffs, and affirmed the damages awarded by the jury to four plaintiffs.

In summary, the court affirmed the trial court's exoneration of the Ford Motor Company, reversed the judgment against the Goodyear Tire and Rubber Company, and affirmed the judgment against Delgado Community College. Additionally, because Delgado remained as the only defendant legally responsible for the accident, it became liable for 100% of the plaintiffs' damages.

Allwood v. C. W. Post  
College (1993)

Facts. Noel Allwood filed suit against C. W. Post College to recover damages for injuries sustained after slipping in a puddle of water during basketball practice at the college. C. W. Post filed a motion for summary judgment which was denied and the college subsequently appealed.

Arguments. Allwood argued that the college was negligent in its maintenance of the gym. Allwood presented "evidence that the area was dimly lit, that the gymnasium floor was warped and uneven, and that puddles of water had been allowed to accumulate at various locations throughout the

gymnasium" (Allwood, 1993, p. 311). C. W. Post argued that Allwood assumed the risks of playing basketball in the gymnasium by willingly participating in basketball practice.

Decision/rationale. Summary judgment is granted only in cases where there are no questions of material fact and one party is entitled to judgment as a matter of law. In this case, the Supreme Court, Appellate Division agreed with the trial court that there was a question of fact as to whether Allwood "assumed [the] risk of slipping in [a] puddle of water by voluntarily participating in basketball practice" (Allwood, 1993, p. 310). The question of fact arose from the evidence of numerous facility hazards. If these hazards did, in fact, exist, then they may have posed risks to Allwood which were not inherent to the activity in which the injury occurred. Therefore, the appellate court affirmed the trial court's denial of summary judgment in favor of the college.

Jones v. Iowa Central  
Community College (1992)

Facts. Randolph Jones was a promising collegiate basketball player at Southern Methodist University (SMU) who became academically ineligible to participate in an NCAA Division I program. Jones subsequently left SMU and eventually landed at Iowa Central Community College (ICCC) where he played basketball while attempting to regain his NCAA eligibility. While at ICCC, Jones was injured while returning from a tournament when the team van was struck from the rear by a truck. One row of the van's seats broke

free from the floor during the accident and fell backwards onto Jones. Jones suffered cartilage damage to his knee as well as a strained back. Jones was later forced to leave ICCC because of academic reasons and returned to his home in Syracuse, New York. There, he was unable to sustain employment as a laborer because of physical limitations resulting from the accident. Jones was also unable to resume his athletic career because of "chronic pain" (Jones, 1992, \*4) he attributed to injuries suffered in the accident.

Jones filed a personal injury suit against ICCC and its head basketball coach who was driving the van at the time of the accident. At the original trial, the jury found ICCC to be negligent and "awarded Jones \$250,000 for loss of future earning capacity and \$20,000 for future pain and suffering" (Jones, 1992, \*1). The college filed a motion for judgment notwithstanding the verdict which was granted by the District Court and the damage awards were set aside. Citing insufficient evidence to support Jones' contention that he would regain his academic eligibility, the District Court ruled that the jury's award of damages for loss of future earning capacity was inappropriate. Likewise, the District Court found insufficient evidence to support the jury's award for future pain and suffering. The court stated that Jones was unable to identify specific pain he suffered as a result of injuries sustained in the accident. Jones subsequently appealed the District Court's order granting judgment notwithstanding the verdict to the college.

Arguments. Jones argued that there was sufficient evidence presented at trial to support the jury's awards. Jones' physician testified to the presence of swelling in Jones' knee and the possibility that his "back may never heal" (Jones, 1992, \*4). His parents testified about the decrease in their son's active lifestyle as a result of his injuries. Additionally, an assistant basketball coach at Syracuse University who had observed Jones play in high school testified that Jones had the ability to "play professional basketball in Europe...[and] could have earned \$75,000 a year for ten years" (Jones, \*8).

Decision/rationale. The United States Court of Appeals for the Eighth Circuit stated that judgment notwithstanding the verdict should only be granted when all the evidence points in favor of one party and there are "no reasonable inferences sustaining the position of the nonmoving party" (Jones, 1992, \*3). In this case, the court believed the evidence not only created an inference supporting Jones, but actually supported the jury's damage awards.

The court stated that the evidence clearly illustrated Jones' diminished future earning potential because of his diminished capacity to engage in physical tasks. The future physical tasks in question did not have to be associated with playing basketball for Jones to prevail. Therefore, the Circuit Court found the District Court's emphasis on Jones' academic eligibility difficulties to be irrelevant. Once Jones' physical impairment was

established, his entitlement to compensation was a question to be addressed by the jury.

Regarding the award for future pain and suffering, the court found that a "reasonable jury could find Jones had not fully recovered from his injuries at the time of trial" (Jones, 1992, \*11). Under Iowa law, a jury can infer future pain and suffering if the plaintiff is still suffering from pain at the time of the trial and there is evidence of an incomplete recovery. The jury's verdict was, therefore, not unreasonable given the evidence presented.

The Circuit Court reversed the District Court's order granting ICCC judgment notwithstanding the verdict. The Circuit Court remanded the case to the District Court to rule on the college's alternative motion for a new trial.

DiVenere v. University  
of Wyoming (1991)

Facts. Vince and Margo DiVenere filed suit against the University of Wyoming to recover damages for injuries Mrs. DiVenere sustained when she "fell on an icy patch on the concourse leading to the upper deck" (DiVenere, 1991, p. 274) of War Memorial Stadium in Laramie. The university filed a motion for summary judgment which was granted by a Wyoming district court. The court ruled that the state's tort claims act provided immunity for the university from suits based on the maintenance of its football stadium's ramps and concourses. The DiVeneres appealed to the Supreme Court of Wyoming.

Arguments. The DiVeneres argued that the University of Wyoming's immunity is waived by the Wyoming Governmental Claims Act which designates governmental entities liable for injuries caused by government employees' negligence in the operation or maintenance of buildings, recreation areas, or public parks. The DiVeneres maintained "that the concourse ramps are permanently affixed as an integral part of the stands" (DiVenere, 1991, p. 275) and the stadium itself fits the definition of a building. Additionally, they argued that the university's athletic complex, including the football stadium, constituted a recreation area.

The University of Wyoming also cited the Wyoming Governmental Claims Act as the foundation of their argument. The statute allows governmental immunity from liability for injuries caused by the improper maintenance of bridges, culverts, roadways, alleys, sidewalks, and parking areas. The university argued that the concourse ramps are considered sidewalks and, therefore, the university is immune from suit for any accident which occurred on those ramps.

Decision/rationale. The Supreme Court of Wyoming's decision hinged on its interpretation of the status of the stadium and its concourse ramps. The court noted that sidewalks are "generally considered to be part of the public street" (DiVenere, 1991, p. 275) and that the stadium ramps are not consistent with this definition of a sidewalk. Additionally, the court stated that sports facilities, including War Memorial Stadium, are clearly considered



recreation areas. Lastly, the court found the concourse ramps to be "an integral part of the recreation area itself" (DiVenere, p. 276).

The court therefore ruled that the DiVeneres successfully stated a claim against the university based on the negligent maintenance of a recreation area. This claim is not prohibited under Wyoming statutes. Accordingly, the court reversed the entry of summary judgment in favor of the university and remanded the case for further proceedings.

Gilligan v. Villanova  
University (1991)

Facts. Donald Gilligan, a student at Villanova University, slipped and fell on a snow-covered grassy area outside the university's Du Pont Pavilion on his way to a basketball game on February 18, 1986. Gilligan and a friend had been walking on a sidewalk which intersected with another sidewalk which provided "indirect access to the pavilion" (Gilligan, 1991, p. 1008). Instead of following the second sidewalk, however, the two men decided to take a more direct route across the grass. Gilligan testified "that this grassy area was snow covered, uneven, rather hilly, and bumpy" (Gilligan, p. 1006). As a result of his fall, Gilligan sued the university. Villanova University filed a motion for nonsuit which was granted and Gilligan subsequently appealed.

Arguments. Gilligan based his case on two theories of liability. First, he argued that the university was responsible for his accident under Pennsylvania's doctrine of hills and ridges. This doctrine holds property owners

liable if the plaintiff can prove that (a) snow and ice had accumulated on walkways in such a manner as to unreasonably obstruct pedestrian travel, (b) the property owner had constructive or actual notice of the hazardous accumulation, and (c) the hazardous accumulation of ice and snow was the cause of the plaintiff's fall. Villanova argued that the doctrine of hills and ridges was not applicable in this case because Gilligan "fell in a grassy area not intended to be traversed by pedestrians" (Gilligan, 1991, p. 1007).

Gilligan's second theory of recovery was based on the absence of a "sidewalk which leads directly to the pavilion." (Gilligan, 1991, p. 1008). Gilligan argued that Villanova University was negligent in its failure to provide a sidewalk which provided direct access to the pavilion from the sidewalk on which he and his friend had been walking.

Decision/rationale. The Superior Court of Pennsylvania affirmed the trial court's order of nonsuit, although it did find an error in the trial court's application of the doctrine of hills and ridges. The court agreed with Villanova that the doctrine of hills and ridges was not applicable in this case. The court stated that the doctrine was intended to apply to only those areas where pedestrians are expected to walk. Applying the doctrine in situations such as Gilligan's would impose a duty upon landowners to clear snow and ice from their entire property. Such an imposition would, in the opinion of the court, "be impracticable and absurd" (Gilligan, 1991, p. 1007). Because the trial court found that Gilligan failed to demonstrate the elements

necessary to recover under the doctrine of hills and ridges, the Superior Court ruled that its erroneous application of the doctrine was harmless.

As to Gilligan's claim that the university was negligent in its failure to provide a direct walkway to the pavilion, the Superior Court affirmed the trial court's ruling that this argument was groundless. Because the university maintained a sidewalk which provided an indirect route to the pavilion and because Gilligan failed to demonstrate that this sidewalk was unsafe, both courts ruled that there was insufficient evidence from which a jury might conclude the university to be negligent. The Superior Court concluded that Gilligan voluntarily chose a route to the pavilion which was covered in snow and not intended for pedestrian travel, and this decision led to his fall. The court therefore affirmed the trial court's order of nonsuit.

#### Defamation

##### Livingston v. Murray (1992)

Facts. In March of 1989, Eileen Livingston was notified that her contract as Athletic Director at Duquesne University would not be renewed at the expiration of its current term on June 30, 1989. This decision was made by university personnel in accordance with the restructuring of the university's athletic program. Details of the changes at Duquesne were outlined in three articles appearing in Pittsburgh newspapers in 1989. Livingston filed a defamation suit against Duquesne University and its president for alleged defamatory statements contained in these articles.

Livingston's cause of action for two of the articles was barred by the statute of limitations. With regard to the third article, the trial court granted summary judgment in favor of the university finding the statements contained in the article were "incapable of defamatory meaning" (Livingston, 1992, p. 445). Livingston appealed the summary judgment.

Arguments. Livingston maintained that statements printed in a Pittsburgh newspaper article announcing the hiring of Brian Colleary as Livingston's replacement were defamatory in nature. Specifically, Livingston argued that a statement in the article attributed to Duquesne University's president that the university now has an athletic director "'who has respect around the country,'...is capable of defamatory meaning" (Livingston, 1992, p. 447).

Additionally, Livingston argued that the article could be interpreted as "defamatory by innuendo" (Livingston, 1992, p. 449). Livingston suggested that the reference to her termination, together with the glowing assessment of Colleary, implied to readers that, unlike her replacement, she lacked national respect and the qualifications to serve as an athletic director.

Decision/rationale. The Superior Court of Pennsylvania stated that a published article is defamatory if it tarnishes a person's reputation, exposes one to ridicule, contempt or hatred, or reduces one's status in his or her profession, community, or association with others. It is the court's duty to determine if the challenged publication has a potentially defamatory

meaning. To make this determination, the court must interpret the publication as it would be understood and interpreted by its intended readers. If the court determines that the publication is not defamatory in nature, then the claim should not proceed to trial and summary judgment would be appropriate.

The court found that the article in question was clearly not defamatory towards Livingston. The only mention of Livingston in the entire article is in the first paragraph where it is stated that she had been terminated. There was no elaboration on this point which would disparage Livingston's reputation or subject her to ridicule, contempt, or hatred. The court stated that the fact that an article "may annoy or embarrass a person is not sufficient as a matter of law to create an action in defamation'" (Livingston, 1992, p. 447). The remainder of the article dealt exclusively with Colleary's qualifications and achievements which in no way reflected upon Livingston's character or qualifications.

The court also rejected Livingston's argument that the article was defamatory by innuendo. The court acknowledged that a publication may, in fact, be defamatory by innuendo but the innuendo must be clearly supported by the content of the article. Further, the innuendo must be supported by the plain meaning of the words and language used in the communication. In this case, the court found the only reasonable innuendo which could be inferred from the article to be that Duquesne University's

athletic program would now be able to attain national recognition and respect through the hiring of Colleary. The court stated that because Livingston's alleged innuendo could "only be obtained by means of a tortured and unreasonable construction, the publication cannot be deemed defamatory" (Livingston, 1992, p. 450). Therefore, the trial court's ruling was found to be correct and the Superior Court affirmed its entry of summary judgment in favor of Duquesne University.

Folse v. Delgado Community College (1991)

Facts. In May of 1989, Charles Folse, the head basketball coach at Delgado Community College was informed by his assistant coach, Tommy Smith, that interim college president James Callier had begun an evaluation of Folse's job performance. The college announced to the press that Folse had been demoted and that Smith would serve as head coach during the evaluation period. Folse was eventually forced to resign after increased pressure from the media which was allegedly provided with false information regarding Folse's conduct. Folse filed suit against the college, its board of trustees, and college employees in their official and individual capacities claiming civil rights violations, breach of contract, and defamation. Folse sought injunctive relief as well as damages. The defendants subsequently filed a motion for summary judgment which was the matter addressed in this case.

Arguments. Folse argued that his forced resignation was the result of a systematic effort on the part of Callier and other members of the "black caucus" (Folse, 1991, p. 1136) at the college to replace Caucasian employees with African-Americans. Folse testified that Callier had "implemented a policy of discrimination against whites and in favor of blacks, discharging whites from positions of employment and elevating blacks in employment, on the basis of race, thereby denying whites their rights to due process" (Folse, p. 1136). Specifically, Folse argued that he was demoted from his position without good cause and that he was deprived of his property interest in his position as head coach without a hearing or notification. Additionally, Folse maintained that the defendants "conspired to circulate and publish scurrilous, false charges against him to force him out of his job" (Folse, p. 1142).

The defendants argued that the college, the board of trustees, and the college employees acting in their official capacities were protected from suit by Eleventh Amendment sovereign immunity. They further argued that the college employees were protected from suit in their individual capacities through qualified immunity. Lastly, the defendants maintained that Folse had no factual basis for his breach of contract and defamation claims and that his resignation was not forced, but rather a "compromise agreement under Louisiana law" (Folse, 1991, p. 1140).

Decision/rationale. The United States District Court for the Eastern District of Louisiana first addressed the defendants' claims of immunity. The court ruled that the college and the board of trustees were clearly agents of the state government and that any judgment against these defendants would be paid with state treasury funds. Therefore, the college and the board of trustees were entitled to sovereign immunity. Likewise, the individual defendants in their official capacities were protected from damage claims through sovereign immunity. They were not, however, found to be immune from claims for injunctive relief against them in their official capacities.

The court then rejected the defendants' claims of qualified immunity from suit in their individual capacities. The court stated that qualified immunity is appropriate only when an official's "actions were reasonable under the law" (Folse, 1991, p. 1139). In this case, the court found that the defendants not only failed to act in good faith but that Folse was successful in establishing a prima facie case of racial discrimination and Fourteenth Amendment violations as well. In the words of Judge Schwartz, it appeared that Folse "was 'ambushed' and effectively 'railroaded' out of his position by certain members of the administration and staff of Delgado" (Folse, p. 1141).

The court also rejected the defendants' motion for summary judgment on Folse's breach of contract and defamation claims. As noted above, the



court found numerous disputed facts with regard to Folse's termination that precluded summary judgment against Folse on his breach of contract claim. The court also found ample evidence to support Folse's claim that the "defendants 'manufactured' the charges levied against him, and communicated those charges to the news media" (Folse, p. 1142). Therefore, the defendants' motion to dismiss Folse's defamation claim was also denied. The defendants countered by arguing that Folse's status as head coach qualified him as a public figure, thus raising the threshold for a defamation claim. The court rejected this argument as well, stating that elevating a coach at a small community college to "public figure" status for defamation purposes was untenable.

In summary, the District Court dismissed Folse's claims for damages against the college, the board of trustees, and the individual defendants in their official capacities. The court denied the individual defendants' motion to dismiss Folse's claims for damages against them in their individual capacities. Lastly, the court denied the defendants' motion for summary judgment with regard to Folse's breach of contract and defamation claims.

## CHAPTER VII

### SYNTHESIS AND RECOMMENDATIONS

Although a number of defendant institutions prevailed in litigation included in this study, the "bottom line" ruling is not necessarily the critical element to be taken from each case, and should not, in itself, be singularly encouraging to athletic administrators. Regardless of the judgment, litigation in and of itself can impose a tremendous burden on an institution in terms of money, human resources, time, and prestige. The mere fact that a complaint resulted in litigation should serve as a beacon to athletic administrators to examine their practices in that particular area and make the necessary adjustments to avoid similar complaints, even if it is unlikely that a plaintiff would prevail in court. Therefore, while it is imperative that administrators take heed of decisions against institutions, it will also serve them well to examine closely those circumstances which resulted in litigation in which the plaintiffs did not ultimately prevail.

Additionally, because law is such a dynamic and complex field, one cannot be too comfortable in the knowledge that a previous case with circumstances similar to one's own resulted in a favorable judgment. As Cooke (1993) noted, "it is very difficult to draw specific conclusions from

legal research" (p. 200). Jurisdictions differ, precedent changes, and subtle differences in circumstances which may go undetected to one not trained in the law could very well prevent one case from being "directly in point" (Rombauer, 1991, p. 37) with a previous case, yielding an unpredictable and "entirely different verdict" (Cooke, p. 210).

Based on the above observations, together with the fact that this study was intended to be utilized as an educational tool, the following discussions, while clearly emphasizing the rationale behind rulings unfavorable to institutions, will also incorporate dicta, dissenting opinions, and arguments made in cases in which the defendants prevailed. Albeit unbinding, dicta, dissenting opinions, and unsuccessful arguments can prove quite useful in the development of practical recommendations for a working, non-legal document such as this.

This chapter was organized in accordance with the litigation typology developed in Chapter III. Conclusions are presented and discussed for each sub-area within the major areas of litigation. Recommendations are presented at the end of each section dealing with the major areas of litigation. These recommendations are not intended to be exhaustive within each area of law as volumes have already been written about each subject. Rather, the recommendations forwarded by this researcher are based on the rulings, arguments, and rationale presented in the cases utilized in this study, as well as concepts drawn from the review of related literature. The resulting

recommendations are, therefore, focused on the dominant legal issues of the 1990's.

### Gender Equity

#### Conclusions/Discussion

Suits by female students. The majority of Title IX complaints by female student-athletes which resulted in litigation this decade revolved around the issue of whether female student-athletes' interests and abilities were being effectively accommodated by their institutions (Cohen v. Brown University, 1992/1993/1995; Favia v. University of Pennsylvania, 1993a/1993b; Roberts v. Colorado State University, 1993/Roberts v. Colorado State Board of Agriculture, 1993). In assessing this issue, courts have consistently applied the three-pronged test outlined in the Title IX Policy Interpretation (1979) for analyzing participation opportunities for all students. The first step is to determine if an institution's athletic participation ratios are substantially proportionate to the undergraduate enrollment of each gender. If not, the next step is to inquire into the institution's history and continued practice of program expansion for the underrepresented gender. If an institution fails to show a history or continuing practice of expansion, the final step is to require the institution to demonstrate that the underrepresented students' athletic interests and abilities have been fully and effectively accommodated by the institution's current program. When an institution has failed to

demonstrate compliance with at least one of the above tests, it has been found to be in violation of Title IX mandates.

The three-pronged test has proven to be a difficult, if not impossible avenue through which institutions have attempted to demonstrate compliance after having eliminated women's programs. The concept of proportionality, although not the sole determinant of compliance, is assessed in the first prong of the test and has proven to be the cornerstone upon which compliance is based. In recent cases, Brown University, Colorado State University, and Indiana University of Pennsylvania all had disproportionate participation ratios when they eliminated women's programs. The corresponding elimination of men's programs proved to be insufficient justification for the elimination of the women's teams. Often, when the institution eliminated a corresponding men's program, the actual result was a compounding effect of the original imbalance. By reducing the number of men's and women's programs equally, schools which already had a disproportionate number of male athletes tended to exacerbate the proportional discrepancy between the number of female athletes and the female enrollment. Therefore, each of the universities in this study which were subjected to the proportionality test failed.

Once it was determined that an institution failed the proportionality test, it was virtually impossible to pass either of the next two prongs. In an era of declining revenues and budget cuts, it was very difficult for the schools

to demonstrate a history of women's program expansion. Even if a defendant institution was able to demonstrate a *history* of program expansion, it could not reasonably demonstrate a *continuing practice* of expansion as evident by the fact that it had recently eliminated a program which led to the current litigation. Likewise, the universities were unable to satisfy the third prong of the test. When a viable program with healthy participation is eliminated and the affected student-athletes protest its elimination, it is readily apparent that the athletic interests and abilities of those students have not been fully and effectively accommodated.

From the cases cited in this study, it has become clear that an institution in violation of Title IX has limited options in attempting to restructure its athletic program. Arthur Bryant, the Executive Director of Trial Lawyers for Public Justice, stated, "the lesson of [Title IX] litigation is that when women are not already being given an opportunity to participate in proportion to enrollment and schools eliminate teams, it had better be men's teams only" (Blum, 1993, p. 31). The Cohen (1995) court summarized an institution's options concisely when it stated that a school "may eliminate its athletic program altogether, may elevate or create the requisite number of women's positions, it may demote or eliminate the requisite number of men's positions, or it may implement a combination of these remedies" (p. 214).

Absent from the above remedies is the assurance of future expansion of women's programs when funding becomes available. The Favia (1993a)

court rejected the notion that cuts in women's programs were allowable when accompanied by promises of replacement programs at a future date. Also absent is the practice of comparing one's own proportionality statistics with those of another institution's. This tactic was proven to be especially unsuccessful if the institution with which statistics were compared had not recently eliminated women's teams (Favia, 1993a).

Judgments for Title IX suits filed by female students most often involved injunctive relief for the plaintiffs by reinstating the eliminated program. Class action suits were more successful in affecting change to a program regardless of the status of the original plaintiffs at the time of the final proceeding (Cohen, 1992/1993/1995; Favia, 1993a/1993b). Suits filed by plaintiffs in their individual capacities (Cook v. Colgate, 1992/1993; Roberts, 1993) resulted in damage awards, injunctive relief, attorney's fees, and court-imposed program sponsorship, but also resulted in dismissal for mootness based on the graduation of the plaintiffs (Cook, 1993).

Suits by male students. The analysis of litigation in this study clearly demonstrated that Title IX cannot be violated through the elimination of men's programs at institutions where men still maintain a proportional advantage in participation ratios (Gonyo v. Drake University, 1993/1995; Kelley v. Board of Trustees of the University of Illinois, 1993/1994). Male student-athletes who file reverse discrimination suits under Title IX, while usually able to present a compelling moral argument, have been able to

forward only a tenuous legal position at best. The prevailing attitude of the courts has been that "men's athletics have reaped the benefits of favoritism" (Favia, 1993a, p. 585) and that it is the courts' duty, through procedures outlined in the Title IX Policy Interpretation (1979), to remedy that favoritism. Even when female student-athletes receive a greater proportion of an institution's scholarship budget, if participation ratios are in favor of men then the male plaintiffs will not prevail. The Gonyo court found that the proportionality test was a more comprehensive remedy to serve the purposes of Title IX than comparing scholarships across gender. Therefore, elimination of a men's program is perfectly acceptable under Title IX if men's participation opportunities are "more than substantially proportionate to their enrollment" (Kelley, 1993, p. 242).

The courts' "deference to regulations and interpretations promulgated under the authority of Congress" (Kelley, 1993, p. 242) and the elevation of the proportionality test to serve as "the benchmark of compliance with Title IX" (Wong and Barr, 1993b, p. 10) have had an insidious effect on the "plain meaning of Title IX" (Kelley, 1993, p. 241) and its enforcement. As the Kelley (1993) court noted, Title IX has been converted "from a statute which prohibits discrimination on the basis of sex (defined as the elimination of or exclusion from participation opportunities), into a statute which provides 'equal opportunity for members of both sexes'" (p. 241).



It is more than a bit ironic to note that while the spirit of Title IX, as applied to athletics, is to increase participation opportunities for women and eliminate discrimination, the legal application in the majority of the cases in this study led to decreased opportunities for men with no corresponding increase in women's opportunities. While this approach clearly allows an institution to move closer to Title IX compliance, it serves neither the female student-athletes who have limited participation opportunities nor the male student-athletes who lose theirs. The only positive result from Title IX litigation forwarded by students in this study was the protection or reinstatement of women's varsity programs which had previously existed. No men's programs were protected from elimination nor were any new women's programs established.

Suits by employees. Suits in this category all featured multiple claims of gender discrimination under various federal statutes, including Title IX. Although Title IX was cited in each complaint, Title VII and the Equal Pay Act violations were also commonly alleged and often the more appropriate avenue through which to seek redress. Each case dealt with one or more of three legal issues: (a) retaliatory discharge, (b) employment discrimination, and (c) equal pay. Of the cases in this study that dealt with these issues, 75% were filed by coaches of women's teams (Clay v. Neosho County Community College, 1995; Deli v. University of Minnesota, 1994a; Harker v. Utica College of Syracuse University, 1995; Paddio v. Board of Trustees

for State Colleges and Universities, 1993; Stanley v. University of Southern California, 1994/1995; Trefny v. Lake Forest College, 1990/1991). Synthesis of these cases shed light on what employment decisions are allowed under Title IX, Title VII, and the Equal Pay Act.

Retaliatory discharge claims, which once were filed exclusively under Title VII, may now begin to be filed under Title IX as well. Title VII contains language within the statute itself which expressly prohibits retaliation against anyone who exercises his or her rights under Title VII. No such language is contained in Title IX. However, a United States District Court recently ruled that because employment discrimination based on gender is prohibited under Title IX, so too, should retaliation against employees who point out Title IX violations (Clay, 1995). The court held that claims against an employer who retaliated against an individual for speaking out against Title IX violations should be allowed to proceed in court regardless of the gender of the plaintiff. Because the court admitted that it had some "misgivings" (Clay, \*13) about allowing a private right of action for retaliation under Title IX, it will be interesting to see how courts rule on this issue in the future.

Claims of employment discrimination based on an individual's gender are clearly viable under Title IX (Broussard v. Board of Trustees for State Colleges and Universities, 1993; Paddio, 1993). Title IX does not, however, prevent discriminatory conditions of employment if the employer can

demonstrate nondiscriminatory justification for those conditions (Harker, 1995). Title VII claims of employment discrimination are also viable provided the discrimination was based on the gender of the violated employee, not the gender of the individuals for whom the plaintiff had oversight or supervisory duties. Equal Pay Act claims must also be based on the gender of the claimant, not that of the claimant's athletes (Deli, 1994a).

Claims of pay inequities between genders were a bit more complicated. The Title IX Policy Interpretation (1979) clearly states that disparities in coaches' compensation violates Title IX only if it denies male and female athletes an equivalent quality of coaching. Litigants "shoot themselves in the foot" when they file a Title IX claim based on unequal pay and then point to their long history of success and honors as a coach as evidence that they should receive equal compensation as their male colleagues (Deli, 1994a; Stanley, 1994/1995). In doing so, they make the defendant's case that the plaintiff's athletes have not been denied quality coaching by the lower compensation of their coach. To the contrary, the defendants can demonstrate that the salary they provided their coach was sufficient to attract and retain a highly successful and qualified coach who provided their female student-athletes with superior coaching.

Although disparities in coaches' salaries based on their gender is not expressly forbidden under Title IX, it is prohibited under Title VII if gender discrimination can be demonstrated and under the Equal Pay Act if the

plaintiff can establish that her job was substantially equal in responsibility and scope to her male counterpart's. However, demonstrating that one's job requires "equal skill, effort, and responsibility" (Harker, 1995, p. 380) to that of another has proven to be quite arduous. The Stanley court ruled that a coach's additional duties relating to revenue production, promotions, and public relations can adequately differentiate one coach's responsibilities from another's. Differences in these areas can prevent one coach from legally demanding equal pay based on substantially equal work. Other variables the court can examine to differentiate between job positions include media exposure, required speaking engagements, fan attendance at contests, and pressure to win. Rewards in salary for professional experience, seniority, and advanced education are also allowed under the Equal Pay Act (Deli, 1994a; Harker, 1995; Stanley, 1994/1995). The Harker court did state, however, that a master's degree alone is insufficient justification for pay disparities if required duties between a male and female coach are equal.

### Recommendations

The following recommendations were developed through the synthesis of gender equity litigation as well as the incorporation of concepts drawn from the review of related literature:

1. Make Title IX compliance a top priority within the institution's athletic department.

2. Designate one individual in the athletic department as having Title IX compliance oversight authority and provide this person with all necessary support.

3. Annually evaluate the athletic department's compliance with Title IX directives using Office of Civil Rights criteria. Identify discrepancies and take immediate action to correct them in accordance with Title IX mandates.

4. Periodically survey the undergraduate student body to identify student interests and abilities which may not be accommodated under the current athletic program.

5. Develop an internal grievance process to raise the administration's awareness of problems which can be resolved without external administrative or legal action.

6. Strive for participation proportionality by increasing women's participation opportunities whenever possible.

7. Attempt to achieve proportionality in scholarship and program funding.

8. Be creative in reaching proportionality without making wholesale cuts in men's non-revenue sports. Investigate alternatives such as reduced roster sizes of men's sports, increased marketing and sponsorship efforts for women's revenue-producing sports, and equitable redistribution of available funds within the department.

9. DO NOT eliminate women's programs if the athletic department has not yet reached proportionality in participation ratios.

10. Ensure differences in men's and women's non-financial program components such as equipment and practice and locker facilities are mitigated by nondiscriminatory justification.

11. Carefully draft job descriptions of department employees, particularly coaches. Provide comparable compensation to employees with comparable job descriptions unless the department has "a seniority, merit or other system in place to show that the discrepancy in salary is not based on gender" (Wong & Barr, 1994b, p. 14).

12. Ensure the compensation provided coaches of women's teams is sufficient to attract and retain coaches of equal quality to the men's coaches.

13. Refrain from taking retaliatory action against an individual who forwards a Title IX complaint.

14. Continually educate oneself on trends and developments in Title IX interpretation and application.

### Contract Law

#### Conclusions/Discussion

Suits by employees. Most of the contract claims filed by employees of higher education athletic departments were the result of an alleged wrongful discharge. The catchall statute under which many of these actions are

brought by public employees is Section 1983 of Title 42 of the United States Code (Griffin v. Triton College, 1993; Kroll v. Board of Trustees of the University of Illinois, 1991; Mackey v. Cleveland State University, 1993; Rodriguez v. Board of Trustees for State Colleges and Universities, 1993/1994; Willson v. Board of Trustees of The Ohio State University, 1991). To successfully state a claim under Section 1983, the "plaintiff must identify [a] right secured by the United States Constitution and deprivation of that right by person[s] acting under color of state law" (Mackey, p. 1397). With the exception of Rodriguez, the plaintiffs each claimed they were deprived of their property interest in employment without due process of law as required by the Fourteenth Amendment of the United States Constitution. Only Willson was successful in stating a viable Section 1983 claim.

Although continued employment is clearly considered by the courts to be a property interest, the protection that interest is afforded is not always clearly defined. The United States Court of Appeals for the Sixth Circuit has ruled that wrongful discharge of public employees by a state actor does not give rise to Section 1983 claims for violation of substantive due process. Rather than being interpreted as a constitutional violation, these matters are more appropriately "viewed as a simple breach of contract claim" (Mackey, 1993, p. 1402). Neither does it necessarily give rise to procedural due process claims. Although procedural due process is normally required for

individuals who are to be deprived of a liberty or property interest, the United States Supreme Court has ruled that the "unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available" (Hudson v. Palmer, 1984, p. 533). A post-deprivation remedy does not, however, satisfy due process requirements if the deprivation was "caused by conduct pursuant to established state procedure, rather than random and unauthorized action" (Hudson, p. 532). Plaintiffs involved in two separate cases in this study were unable to demonstrate that the deprivation of their property interest in employment was the result of established state procedure, custom, or policy and therefore failed to prevail in their Section 1983 claims (Griffin, 1993; Mackey).

Defendants also successfully defended Section 1983 actions by claiming Eleventh Amendment governmental immunity (Kroll, 1991; Laxey v. Louisiana Board of Trustees, 1994; Mackey, 1993). State agents may claim Eleventh Amendment immunity from federal suit unless their state unequivocally waives immunity and consents to suit in federal court or the United States Congress abrogates the states' immunity under the Eleventh Amendment.

Another issue that consistently arose in the analysis of litigation was the status of employees and the criteria required for termination. It is clear from



the litigation analyzed in this study that there is absolutely no obligation on the part of an educational institution to extend an at-will employee further employment. At-will employees are subject to termination at any time with no explanation required (Brodhead v. Board of Trustees for State Colleges and Universities, 1991; Frazier v. University of the District of Columbia, 1990; Rodriguez, 1993/1994). The traditional employment-at-will doctrine as it applies to institutions of higher education, has, however, been substantially eroded over time (Hustoles, 1984). The concept of tenure, the increased reliance on implied-in-fact contracts, and "just cause" stipulations in collective bargaining agreements have forced institutions to defend many personnel decisions in court.

Implied-in-fact contracts can be created through actions of an employer which create a "reasonable expectation" (Wood v. Loyola Marymount University, 1990, p. 233) on the part of employees that they will not be terminated in the absence of just cause. Such actions can be in the form of verbal statements or assurances, written personnel policies, or industry and employer practice and custom. The burden of establishing a breach of an implied-in-fact contract lies on the plaintiff "to show the existence of an agreement, either express or implied, not to terminate except for good cause *and* that the employer lacked good cause for the discharge" (Wood, p. 231).

The concept of just cause was an issue raised in much of the litigation in this study (Dambrot v. Central Michigan University, 1993/1995; Deli v. University of Minnesota, 1994b; Gibson v. Kentucky State University, 1990; Mackey, 1993; Maddox v. University of Tennessee, 1995; Trefny v. Lake Forest College, 1990/1991; Wood, 1990). To terminate an employee for just cause, the institution must demonstrate that the individual "breached the standards of job performance established and uniformly applied" (Deli, 1994b, p. 52) by the institution. Incompetency, immorality, insubordination, and dishonesty have consistently been identified as just cause for termination (Deli, 1994b; Kaplin, 1985; Trefny).

Just cause was also established as justification in cases in which it was argued that the plaintiff had constitutional or statutory protection from termination. The Dambrot court ruled that employees enjoy First Amendment protection to express viewpoints which may be offensive to others, but employers are not constitutionally required to tolerate one's offensive private statements. Therefore, offensive speech which does not touch on a matter of public concern is not constitutionally protected and one can be terminated for just cause because of its use. Likewise, the Rehabilitation Act of 1974 and the Americans with Disabilities Act of 1990 allow termination of disabled employees for just cause. Both statutes allow employers to hold alcoholics to a certain standard of conduct, below which they may not fall (Mackey, 1993; Maddox, 1995). The disability of alcoholism does not

allow an employee to exhibit all degrees of misconduct under the guise of his or her disability.

The Statute of Frauds and the doctrine of equitable estoppel were also used successfully by defendant institutions to resist breach of contract claims. The Statute of Frauds voids oral contracts, to include representations made to prospective students, which cannot be fully performed within one year of the agreement (Cooper v. Peterson, 1995; Dickens v. Quincy College Corporation, 1993). The Statute of Frauds "has been adopted, in a more or less modified form, in nearly all of the United States" (Black, 1991, p. 457). The doctrine of equitable estoppel prevents an individual from asserting a contract claim if that individual's prior action resulted in the change of position by the second party to the contract. If the second party's change in position was clearly reliant on the first party's actions, and subsequent breach of contract action would be detrimental to the second party, the first party's voluntary actions bar any claim to assert contractual rights under the original contract (Trefny v. Lake Forest College, 1990/1991).

In addition to the major employment issues that were frequently addressed in the litigation, there were two lessons regarding damages that were raised by the litigation which could prove significant to athletic administrators as well. Although wrongfully discharged employees are required to mitigate compensatory damages by seeking comparable employment or

accepting reassignment to a comparable position within the department, the administrator may be required to justify the reassignment of department personnel after termination from their original position to avoid a damage award (Willson, 1991). This justification places a burden on the administrator to demonstrate that the position to which the employee was reassigned is comparable to the employee's original position. If the employer fails to demonstrate that the two positions were comparable, the plaintiff's failure to accept the reassignment may not be construed by the court as a failure to mitigate damages. Additionally, an athletic administrator could be found individually liable for punitive damages if compensatory damages were awarded to a plaintiff jointly and severally against numerous defendants, of which the administrator was one.

The final point to be taken from the analysis of contract actions brought by employees is the importance of following clearly established procedures. Even though several defendants ultimately prevailed, many athletic administrators created unnecessary legal trouble by failing to adequately follow institutional directives and procedures for employee hiring, contract approval, reappointment, and termination (Brodhead, 1991; Deli, 1994b; Trefny, 1990/1991; Willson, 1991; Wood, 1990).

Suits by students. While clearly establishing that a contractual relationship exists between an institution and a scholarship student-athlete, the extent of this contractual relationship was narrowly interpreted in much of

the litigation cited in this study (Conard v. University of Washington, 1991/1992; Cooper, 1995; Gonyo v. Drake University, 1993/1995; Jackson v. Drake University, 1991; Lesser v. Neosho County Community College, 1990). Several courts ruled that scholarship agreements imposed a duty on the granting institution to honor its financial aid obligations only (Cooper; Gonyo, 1993; Jackson; Lesser). The Jackson and Lesser courts ruled that a scholarship only guaranteed financial assistance to a student-athlete and, in no way, assured the student-athlete of an opportunity to participate in competition, or even a secured position on the team's roster. The Cooper court went one step further by ruling that St. Lawrence University had no contractual obligation to recruited wrestlers to provide a university-sponsored wrestling team. This was because the wrestlers received financial assistance based on the same criteria as other students at the university, and these financial agreements would be honored by St. Lawrence even after the elimination of the wrestling team. Wrestlers in this study were consistently unsuccessful when filing either contractual or Title IX claims against institutions which dropped their programs (Cooper; Gonyo, 1993/1995; Soderbloom v. Yale University, 1992).

Courts did, however, closely scrutinize information provided prospective student-athletes by institutions of higher education during the recruitment process (Cooper, 1995; Jackson, 1991; Lesser, 1990; Ross v. Creighton University, 1992; Soderbloom, 1992). In doing so, the courts examined

whether the defendants fraudulently misrepresented the circumstances present at their institutions to induce students to attend. The importance of the Ross decision lay in the fact that it allowed a student-athlete to hold an institution liable for *specific* promises made in the recruitment process. By prohibiting breach of contract actions for claims of inferior education, the Ross court clearly avoided interfering with an institution's autonomy, but in very narrow terms found institutions responsible for specific acts promised in scholarships such as real access to the institution's academic program. The Ross decision represented a somewhat broader interpretation of an institution's potential obligations to scholarship athletes than previous rulings which rejected claims of educational malpractice and found an institution's only contractual obligation to scholarship athletes to be compliance with its financial aid agreements.

The Conard court carefully examined the due process requirements involved in the non-renewal and revocation of a student-athlete's scholarship. Non-renewal does not generally require full procedural due process because an entitlement to a property right is not evident. Athletic scholarships create a protected property interest one year at a time and routine renewal of that property interest does not necessarily constitute a "mutually explicit understanding" (Conard, 1992, p. 22) between the parties for continued renewal. However, a protected property interest in the renewal of a scholarship can be created by institutionally established rules or

regulations which guide decision-makers to a mandatory renewal based on predicated facts. If such regulations are in place, procedural due process would be required for non-renewal of a student-athlete's scholarship.

Additionally, revocation of a scholarship during its stated term also requires full procedural due process.

### Recommendations

The following recommendations were developed through the synthesis of contract litigation as well as the incorporation of concepts drawn from the review of related literature:

1. Retain qualified legal counsel to draft employee contracts as well as department equal opportunity and anti-discrimination policies.
2. Always provide procedural due process, to include a pre-termination hearing, to employees who will be deprived of a liberty or property interest by their discharge. Liberty interests include reputation, good name, and integrity. Property interests include continued employment under a current contract.
3. Carefully follow termination and grievance procedures as outlined in institution publications and by-laws when discharging an employee for just cause. Additionally, ensure that department officials invested with hiring, contract approval, and reappointment authority are consistent with procedures outlined in institution publications.

4. Ensure all employees are well aware of the identity of the institution official[s] who have the authority to modify express terms of employee contracts (preferably the institution's president only).

5. Do not passively allow employees to violate express terms of their contracts, no matter how trivial the violations may appear.

6. Be careful and consistent with employment customs and practices to ensure they do not create an implied-in-fact contract when no such contract was intended.

7. Include a disclaimer in department policy manuals which clearly allows termination of at-will employees with or without just cause.

8. Avoid oral contracts.

9. Allow no individual in the department the authority to make oral agreements or assurances of employment.

10. Consider including a disclaimer in all employment contracts which states that oral agreements carry no force or effect unless incorporated directly into the employee's written contract.

11. Include a contract clause retaining the option to reassign department personnel to other positions within the department.

12. If reassignment of department personnel is necessary, attempt to reappoint them to positions "comparable" to their original positions.

13. Avoid rollover clauses in coaches' contracts.



14. Include a mitigation clause in coaching contracts for payoff at termination.

15. Include a "Pepper Rogers" clause in coaching contracts which, upon termination of a coach, relieves the institution from liability for damages arising from the loss of perquisites associated with the coaching position.

16. Provide student-athletes with procedural due process when revoking or altering their scholarship agreements during the period for which they were contracted.

17. If feasible, do not revoke financial assistance for the remainder of the academic year for which a student-athlete's scholarship was granted.

18. Allow for the exercise of discretion in renewing scholarships. Refrain from implementing institutional procedures which mandate scholarship renewal based on predetermined criteria. An institution incurs no legal obligation to renew a student's scholarship for additional years unless institutional procedures mandate such a renewal.

19. Ensure recruiting correspondence from coaches emphasizes academic and/or university benefits, not specific athletic promises. If programs are subsequently cut or altered, this protects the institution from potential breach of contract actions and claims of false representation.

## Tort Liability

### Conclusions/Discussion

Negligence--supervision/instruction. The failure to provide "specific supervision" (Nygaard & Boone, 1985, p. 9) to athletes during an activity led to the greatest number of tort actions examined in this study (Fisher v. Northwestern State University, 1993; Nova University, Inc. v. Katz, 1993; Riddle v. Universal Sports Camp, 1990; Sicard v. University of Dayton, 1995; Westrum v. Hamline University of Minnesota, 1991). Although final judgments in these cases were split with two in favor of the plaintiffs and three in favor of the defendants, it is clear that an athletic department's failure to ensure all athletic activities are properly supervised does nothing but invite litigation in the event of an injury. In addition to preventing unnecessary litigation, proper supervision may have prevented some very serious injuries suffered by student-athletes in the above cases.

Instruction and training of department personnel, as well as supervision of personnel not specifically engaged in an athletic activity were also points of contention in much of the litigation. (Albano v. Colby College, 1993; Clement v. Griffin, 1994; Healy v. Vaupel, 1990). In Albano, the court ruled that neither the college nor the plaintiff's tennis coach had a legal duty to prevent the plaintiff from becoming intoxicated on a tennis trip. Although it was not determined how Albano sustained his severe head injury, it was clear that alcohol played a role. Notwithstanding the college's lack of a

specific legal duty to supervise and protect Albano, a clear alcohol policy and tough enforcement by the coach may have averted this incident and subsequent litigation. Unlike Albano, Healy claimed it was her university's athletic directors who, through their negligent hiring, training and supervision of the gymnastics coach, were responsible for her injury. She also maintained that the head coach failed to properly train and supervise the team members and assistant coaches and that the team's trainer failed to properly supervise her rehabilitation program. Because the Healy case was remanded for dismissal based on questions of jurisdiction, no definitive answer regarding Healy's complaints were forthcoming. However, the Clement court found that Delgado Community College was negligent in its selection, appointment, and training of a student-coach to drive the baseball team van. The appointment of a student without a chauffeur's license to operate the van was a violation of not only internal rules of the college, but state law as well.

The issue of vicarious liability was raised in three cases (Clement, 1994; Foster v. Board of Trustees of Butler County Community College, 1990/1991; Fox v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, 1990/1991), of which the plaintiff prevailed in two. In Clement and Foster, institutions were found vicariously liable for actions taken by individuals which led to serious automobile accidents. An institution can be held vicariously liable for the negligent acts of

employees or agents of the institution while acting within the scope of their employment. An individual does not need to be under contract or even compensated by the institution to be considered an agent and thereby subjecting the institution to liability under to the doctrine of respondeat superior. The definitive test to ascertain if an individual is acting as an agent of an institution is to determine the degree of control the employer exercised over the purported agent (Foster, 1991). The Clement and Foster (1991) courts both determined that the colleges had sufficient control over the drivers of their vehicles and that those drivers were performing duties as agents of their institutions at the time of the accidents. To the contrary, the Supreme Court of Louisiana ruled that Louisiana State University was not vicariously liable for the negligent conduct of its rugby club (Fox, 1991). The Fox court cited the limited control the university possessed over the rugby club as insufficient to establish the rugby club as "an arm of the university" (Fox, 1991, p. 983).

Clearly the most popular and effective defense to negligence claims forwarded by defendants in this study was the doctrine of assumption of risk (Fisher, 1993; Kennedy v. Syracuse University, 1995; Kyriazis v. University of West Virginia, 1994; Nova, 1993; Riddle, 1990; Sicard, 1995; Westrum, 1991). The doctrine of assumption of risk prevents an individual from recovery of damages for an injury received after voluntary exposure "to a known and appreciated danger" (Black, 1991, p. 82). Of the seven

cases in which the defendants forwarded an assumption of risk defense, four were won by the defendants (Fisher; Kennedy; Riddle; Westrum). The courts in these cases not only found the risk of injury to be an inherent element in collegiate athletics, but also found the plaintiffs to have been well aware of the gravity of the risks to which they voluntarily exposed themselves.

The Riddle court further ruled that an exculpatory agreement releasing one party from liability can serve as written evidence that an individual voluntarily exposed him or herself to a known danger and can therefore be used to forward an assumption of risk defense by a third party. The Kyriazis court, however, found that the execution of an exculpatory agreement does not necessarily serve as notice of voluntary exposure to a known and appreciated danger. The court ruled that circumstances surrounding the signing of the release led to questions of fact regarding the plaintiff's appreciation of the risks inherent to rugby, and these questions were best answered by a jury.

Proper medical procedures were also the focus of many complaints alleging negligent supervision (Healy, 1990; Kennedy, 1995; Kleinknecht v. Gettysburg College, 1992/1993; Lennon v. Peterson, 1993). In each of these cases, the plaintiffs claimed that the defendants breached their duty to provide proper medical attention or treatment. Kennedy failed in his claim because Syracuse University's failure to provide the required standard

of medical care was determined not to be a proximate cause of his injury. The defendants also prevailed in Lennon because their diagnosis of the nature and extent of Lennon's injury, although incorrect, was protected through qualified immunity because it was a discretionary act well within the scope of their authority. The Kleinknecht (1993) court, however, established a strict standard to which an institution's emergency medical procedures may be held. The Kleinknecht (1993) decision is particularly noteworthy because it confirmed the notion that a special relationship exists between an institution and its student-athletes. This special relationship imposes a duty on the institution to provide reasonable medical care and emergency response resources for foreseeable incidents involving its intercollegiate athletes. Therefore, institutions must implement appropriate emergency medical procedures to respond to injuries suffered by student-athletes participating in the activity for which they were recruited (Robinson, 1994). These procedures must ensure the capability of providing "prompt and adequate medical assistance" (Kleinknecht, 1993, p. 1373) to an institution's intercollegiate athletes in the event of an emergency.

Because a special relationship exists between an institution and its student-athletes, institutions incur a duty to protect their intercollegiate athletes from reasonably foreseeable injuries. Injuries are foreseeable if they fall into a "general category of risk" (Lamorie v. Warner Pacific College, 1993) which can be reasonably anticipated. The Kleinknecht (1993) court

ruled that "severe and life-threatening injuries" (p. 1370) were not uncommon in contact sports such as lacrosse, and an institution's failure to protect against them was unreasonable. Likewise, the Lamorie decision held that it should have been clearly foreseeable to the defendant that the plaintiff's existing eye injury increased his risk of additional injuries. Accordingly, an athletic department must protect its athletes from reasonably anticipated injuries, if not the actual sequence of circumstances that can lead to a particular injury.

The two activities which led to the greatest amount of litigation alleging negligent supervision were gymnastics and cheerleading (Fisher, 1993; Healy, 1990; Kennedy, 1995; Nova, 1993; Riddle, 1990; Westrum, 1991). More specifically, the duty to provide spotters was addressed in several of these cases. The Nova court held the university responsible for failing to require spotters for its cheerleaders. The court stated that the plaintiff assumed the risks inherent in collegiate cheerleading, but in no way assumed the risks associated with improper supervision. The Court of Appeals of Minnesota ruled that an intercollegiate gymnast not only assumed the risks inherent in gymnastics, but also knowingly assumed the dangers associated with the absence of a spotter (Westrum). Because the plaintiff could have refused to commence her routine until a spotter was present but instead chose to begin, the court ruled that she effectively assumed the risk of competing without a spotter. The Riddle court also found that the

plaintiff's actions prevented a claim of negligence because of a lack of a spotter. The fact that the plaintiff voluntarily signed an exculpatory agreement releasing the defendant from liability was ruled to be sufficient to relieve the defendant of any responsibility for injuries sustained as a result of the absence of a spotter.

Negligence--facilities/equipment. Plaintiffs in four cases in this study either prevailed (Clement, 1994; Rispon v. Louisiana State University and Agricultural and Mechanical College, 1994) or averted summary judgment (Allwood v. C.W. Post, 1993; DiVenere v. University of Wyoming, 1991) by claiming that the defendant institutions breached their duty to properly maintain their facilities or equipment. The decisions in these cases clearly demonstrate that institutions not only have a duty to provide their student-athletes with properly maintained equipment and facilities (Allwood; Clement), but also incur a duty to provide spectators at their athletic events with a safe environment (DiVenere; Rispon).

Two plaintiffs were unsuccessful, however, in their claims that defendants failed to properly maintain their facilities (Bialek v. Moraine Valley Community College School District 524, 1994; Gilligan v. Villanova University, 1991). The Bialek court found that Moraine Valley Community College's failure to properly maintain a goalpost on its campus, or warn Bialek of its presence, did not constitute willful and wanton misconduct. Additionally, Bialek's failure to exercise reasonable care relieved the college of



any liability. Likewise, the Gilligan court found that Villanova University had no duty to clear snow and ice from areas upon which pedestrian traffic was not expected. Gilligan's decision to traverse an area not intended for pedestrian traffic was voluntary, and the university had no duty to protect him on his chosen route.

The duty to remedy or at least warn patrons of an open and obvious condition was addressed in two cases (Bialek, 1994; Rispono, 1994). While the verdicts differed in these two cases, both decisions suggest that an institution has, as a minimum, a duty to warn patrons of hazardous conditions, no matter how open and obvious. Indeed, a plaintiff's inattentiveness which may actually contribute to an injury will not necessarily relieve a defendant from liability from an open and obvious hazard (Rispono). Additionally, the doctrine of distraction may be applied if an individual is injured while exercising reasonable care at a facility and the caretaker of that facility could have reasonably expected that an individual may become distracted from a hazardous condition present at the facility. A plaintiff may raise this argument even if he or she was previously made aware of the hazardous condition (Bialek).

The doctrine of assumption of risk was also the most popular defense used by defendants named in facilities suits (Allwood, 1993; Gilligan, 1991; Giovinazzo v. Mohawk Valley Community College, 1994). The defendants prevailed in two of these cases (Gilligan; Giovinazzo) but failed in one

(Allwood). The Gilligan and Giovinazzo courts found that the plaintiffs were well aware of the risks to which they voluntarily exposed themselves. The Allwood court, however, ruled that a question of fact existed as to whether the plaintiff voluntarily assumed the risks associated with numerous facility hazards.

Defamation. Due to the limited number of defamation cases identified and analyzed in this study, no clear trends or conclusions were apparent from the synthesis of litigation. The defendants were granted summary judgment in Livingston v. Murray (1992), while they were denied summary judgment in Folse v. Delgado Community College (1991).

#### Recommendations

The following recommendations were developed through the synthesis of tort liability litigation as well as the incorporation of concepts drawn from the review of related literature:

1. Develop a risk management plan for the entire athletic department and mandate that all varsity coaching staffs develop a risk management plan for their respective programs. Plans should be comprehensive and include identification, evaluation, and treatment of risks. Ensure all plans receive adequate support from the administration and are implemented effectively.
  2. Ensure qualified department employees are present at all scheduled athletic practices and competitions to provide "specific supervision"
- (Nygaard & Boone, 1985, p. 9).

3. Mandate the use of spotters, when necessary, at all cheerleading and gymnastics practices and competitions.

4. Use waiver/release forms as a tool to ensure student-athletes are adequately warned of risks inherent to a particular activity. Do not, however, rely on waivers as an impenetrable defense to liability claims.

5. The issue of duties owed to student-athletes for protection from serious injury is complex. At the very least, administrators should ensure that a certified athletic trainer or a direct intercom/telephone line to the training room is available at all intercollegiate practices and contests.

6. Require all department coaches to receive initial and continuity emergency first aid training.

7. Institute an aggressive policy of examination, treatment, and documentation of all injuries sustained by student-athletes.

8. If sued for negligence due to the actions/inactions of a department employee, the institution should first seek to prove the lack of negligence on the part of the employee and that the employee in question was properly trained and qualified. When the employee is cleared of any negligence, the institution, by law, cannot be found liable under the doctrine of respondeat superior.

9. Institute procedures for proper maintenance of department vehicles, selection of operators, and training of operators.

10. Ensure vehicle maintenance procedures for department vehicles are clearly outlined and strictly adhered to in accordance with the vehicles' owner's manuals. Keep owner's manuals accessible to maintenance personnel for reference.

11. Accurately document and track all vehicle maintenance procedures, both preventive and corrective.

12. Develop a "walk-around" vehicle inspection checklist (fluid levels, tire pressure, etc.) to be completed by each vehicle operator prior to driving the vehicle.

13. Ensure drivers of team vehicles are qualified for the class of vehicle they are operating. Comply with state statutes requiring drivers of team vans to possess a chauffeur's license if applicable. Maintain accurate documentation of department drivers' qualifications/certifications.

14. Comply with any existing institutional rules which may forbid students from operating team vehicles.

15. Train all vehicle operators thoroughly and ensure all safety measures are complied with, including the mandatory use of safety belts. Document all driver training.

16. Thoroughly check qualifications, to include driver's license, vehicle registration, and liability insurance, of all agents assigned to transport recruits on campus visits.

17. Conduct scheduled periodic inspections of all department equipment and facilities and make the necessary corrections of defects immediately. Clearly designate personnel responsible for periodic inspections and require complete documentation of inspection results.

18. Once made aware of any potentially hazardous facility condition--no matter how open or obvious--administrators should immediately remedy the hazard, ensure all patrons of the facility receive adequate warning of the danger, or otherwise protect all potential users of the facility from the hazard.

19. Treat all press releases about terminated employees as if they were dealing with private citizens. State clearly established facts only, leaving no room for innuendo. Make no disparaging remarks about the individual's character which would harm the individual's reputation, inspire ridicule, contempt, or hatred, or lower one's status in his or her profession, community, or association with others.

#### Recommendations for Future Research

This author recommends that others build on this research to continually identify the emergence of new legal trends in intercollegiate athletics. Because law is so dynamic, the issues identified in this study may not prove to be the dominant legal issues in the future. Additionally, the comparison of litigation involving public and private institutions' athletic departments may prove useful as well.

### Summary

While litigation has clearly become a popular method of resolving disputes in American society, there are measures which can be taken by athletic administrators to discourage litigation directed at their programs and institutions. However, the development of sound legal practices in an athletic department requires a concerted effort on the part of administrators and coaches as well as medical, maintenance, and facility personnel.

McClung (1981) outlined a four-step procedure for implementing preventive law practices which could be utilized in an athletic department: (a) anticipate potential legal challenges, (b) evaluate the validity of these challenges, (c) consider one's policies and procedures which may invite legal challenges, and (d) modify one's existing practices to reduce legal vulnerability.

Fundamental to each of the above steps is knowledge of legal requirements and education with regard to their application. Athletic administrators must continually educate themselves on developments in statutory and case law. In addition to educating themselves, administrators should adopt a proactive approach in tailoring and modifying their programs in accordance with evolving case law. Litigation targeted against athletic departments will begin to decrease only after athletic directors begin to implement changes to aspects of their programs which invite litigation and courts begin to decrease rulings in favor of plaintiffs. This decrease will only result from "widespread revision of practice in accordance with the holdings of previous

court decisions" (Imber & Thompson, 1991, p. 240). As suggested from the results of this study, administrators in intercollegiate athletics would serve themselves well by initially concentrating their preventive law practices in the areas of gender equity, contracts, and tort liability. However, because of the dynamic nature of law, these areas will not necessarily remain as the most prevalent areas of litigation.

This study was designed to identify policies and practices that have led to legal conflict and to provide analysis of relevant court holdings. The resulting synthesis was intended to facilitate revisions of current practices in order to make collegiate athletic programs legally sound. By examining claims in which the defendants ultimately prevailed as well as those in which the plaintiffs prevailed, practices which led to legal conflict can be identified and corrected so as to make litigation less inviting. Additionally, sound legal practices may lead to a safer environment and a reduction of many of the types of injuries which led to much of the litigation in this study. Revision of current policies and practices which may be legally unsound can allow athletic directors to not only increase their chances of prevailing in litigation, but can also decrease their chances of being required to defend their program in court.

While one can never entirely eliminate the possibility of being named as a defendant in a suit, implementation of sound legal practices can certainly put one "in an excellent position to avoid needless litigation (Nolte, 1979,

p. 23) and provide a stronger position from which to defend oneself against a legitimate claim. Nolte underscored the difficulty of completely avoiding litigation when he forwarded a pragmatic approach to protecting one's program: (a) hire a competent staff educated in legal dangers inherent to your activity, (b) maintain good legal counsel, (c) purchase sufficient insurance coverage, and (d) "keep a low profile and hope for the best" (p. 23).

Hopefully, studies such as this will serve as valuable tools for athletic administrators to utilize in their proactive development of sound legal programs, thereby eliminating the need to follow Nolte's recommendation of passively keeping a low profile and hoping for the best.



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APPENDIX A  
CLASSIFICATION OF CASES



## CLASSIFICATION OF CASES

Contract LawSuits by Employees

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aff'd in part and rev'd in part, 834 P.2d 17 (Wash. 1992).

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in part and rev'd in part, 957 F.2d 410 (7th Cir. Ill. 1992).

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#### Suits by Female Students

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U.S. Dist. LEXIS 3001 (E.D. La. 1993).

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U.S. Dist. LEXIS 1161 (E.D. La. 1993).

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Misuse of Public Funds

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Tort LiabilityNegligence - Supervision/Instruction

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rev'd, remanded, 989 F.2d 1360 (3d Cir. Pa. 1993).

Foster v. Board of Trustees of Butler County Community College, 1990  
U.S. Dist. LEXIS 18241 (D. Kan. 1990), later proceeding, 771 F. Supp.  
1122 (D. Kan. 1991).

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#### Negligence - Facilities/Equipment

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N.E.2d 825 (1st Dist. 1994).

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Dep't. 1994).

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#### Defamation

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Folse v. Delgado Community College, 776 F. Supp. 1133 (E.D. La. 1991).

#### Trademark Infringement

Board of Trustees of the University of Arkansas v. Professional Therapy Services, 1995 U.S. Dist. LEXIS 867 (W.D. Ark. 1995).

APPENDIX B  
LITIGATION ANALYSIS WORKSHEET

## LITIGATION ANALYSIS WORKSHEET

AREA/TPOLOGY:

Gender Equity: \_\_\_\_\_ Contracts: \_\_\_\_\_ Torts: \_\_\_\_\_ Other \_\_\_\_\_

CITATION: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_FACTS: \_\_\_\_\_  
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\_\_\_\_\_  
\_\_\_\_\_PROCEDURES: \_\_\_\_\_  
\_\_\_\_\_LEGAL  
PRINCIPLE: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_DECISION: \_\_\_\_\_  
\_\_\_\_\_RATIONALE: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

ARGUMENTS:

Plaintiff: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_Defendant: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_COMMENTS: \_\_\_\_\_  
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## VITA

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### EDUCATION

Doctor of Education May, 1996	University of Northern Colorado - Physical Education with an emphasis in Sports Administration
Master of Arts June, 1987	California State University, San Bernardino - National Security Studies
Bachelor of Science June, 1983	United States Air Force Academy - History

### EXPERIENCE

1994-1996	Doctoral Student Air Force Institute of Technology Civilian Institution Program
1991-1994	Director, Fitness Testing and Evaluation Division Assistant Wrestling Coach Department of Athletics United States Air Force Academy, CO
1987-1991	Special Missions Examiner Aircraft Commander First Helicopter Squadron Andrews Air Force Base, MD
1984-1987	Standardization/Evaluation Flight Examiner 35th Tactical Training Wing George Air Force Base, CA
1983-1984	Student Pilot (Helicopters) 3588th Flying Training Squadron Fort Rucker, AL